

REPORTS
OF
CASES

DETERMINED

IN THE

Court of 'Sudder Dewanny Adawlut,

WITH

TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

A NEW EDITION.

BY W. H. MACNAGHTEN, ESQ.

REGISTER OF THAT COURT.

VOLUME I.

CONTAINING

SELECT CASES FROM 1812, TO 1819, INCLUSIVE.

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1827.

ADVERTISEMENT.

On the occasion of publishing this new edition of the first volume of reported Civil Cases decided by the Court of Sudder Dewanny Adawlut, it may be as well to mention, for the information of those not immediately acquainted with the forms of proceeding in the Company's Courts, that the proceedings are held in Persian, and the opinions and decrees of the Judges delivered and recorded in that language. It is only very rarely that an English minute is placed on the record, and such a minute, when resorted to, only contains what the Persian record has already in substance.

The Reports contained in this volume were chiefly prepared by Mr. W. Dorin, now a Judge of the Sudder Dewanny and Nizamut Adawlut, and formerly Reporter to those Courts. Some few of the cases, towards the latter end of the volume, were prepared by Messrs. Bird and Holt Mackenzie. The notes appended to the different cases are entitled to weight, as having been written or approved by the Judges by whom those cases were decided; and those explanatory of intricate points of Hindoo Law are especially valuable, as coming from the pen of Mr. H. Colebrooke

With reference to the doctrine laid down in the case of Meer Nujib Oollah versus Doonduna Khatoon (page 103 of this volume) I take this opportunity of correcting an erroneous remark made by me in the note to page 295 of the third volume, wherein I stated, that there did not appear to have been any case yet decided in which prescription from length of time had been held sufficient to bar the claim of a wife to her dower. I now find that I had inadvertently overlooked the case above cited, in which it was determined that exigible dower, not demanded during the period limited by the regulations for the cognizance of actions, cannot be subsequently recovered.

W. H. M.

May, 1827.

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OF THE
COURT OF SUDDER DEWANNY ADAWLUT

PRESENT
DURING THE PERIOD OF THESE REPORTS.

GOVERNOR GENERAL IN COUNCIL, before 1801.

IN 1801.

PETER SPEKE, Chief Judge.
JOHN LUMSDEN.
HENRY THOMAS COLEBROOKE.
JOHN HERBERT HARINGTON.

IN 1802.

GEORGE HILARO BARLOW, Chief Judge absent.
HENRY THOMAS COLEBROOKE.
JOHN HERBERT HARINGTON.

IN 1803.

SIR GEORGE HILARO BARLOW, BART.
HENRY THOMAS COLEBROOKE.
JOHN HERBERT HARINGTON.

IN 1804.

SIR GEORGE HILARO BARLOW, BART.
HENRY THOMAS COLEBROOKE.
JOHN HERBERT HARINGTON.

IN 1805.

HENRY THOMAS COLEBROOKE, Chief Judge, 25th of July 1805.
JOHN HERBERT HARINGTON.
JOHN FOMBELLE.

IN 1806.

HENRY THOMAS COLEBROOKE, Chief Judge.
JOHN HERBERT HARINGTON.
JOHN FOMBELLE.

IN 1807

SIR GEORGE HILARO BARLOW, BART. Chief Judge.
HENRY THOMAS COLEBROOKE.
JOHN HERBERT HARINGTON.
JOHN FOMBELLE.

JUDGES OF THE COURT OF SUDDER DEWANNY ADAWLUT.

IN 1808.

HENRY THOMAS COLEBROOKE, Chief Judge absent.

JOHN HERBERT HARRINGTON.

JOHN FOMBELLE.

BURRISH CRISP, Officiating Judge from 28th of May 1808.

IN 1809.

HENRY THOMAS COLEBROOKE, absent.

JOHN HERBERT HARRINGTON.

JOHN FOMBELLE.

JAMES STUART, appointed Judge on the 3d of February 1809.

IN 1810.

HENRY THOMAS COLEBROOKE, absent.

JOHN HERBERT HARRINGTON.

JOHN FOMBELLE.

IN 1811.

HENRY THOMAS COLEBROOKE.

JOHN HERBERT HARRINGTON, Chief Judge, appointed 17th of Dec. 1811.

JOHN FOMBELLE.

JAMES STUART.

WILLIAM EDWARD REES, Acting Judge, 30th of August 1811.

YNYR BURGESS, Acting Judge, 3d of December 1811.

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CASES

IN THE

COURT OF

SUDDER DEWANNY ADAWLUT.

RAMRUTUN SING, and others, Appellants,

1792.

versus

CHUNDER NARAEN RAI, Respondent.

Sept. 29th.

RAMRUTUN SING, and others, were proprietors of 9½ anas of the tuppa Furokhabad, an hereditary zemindary; and Kishenmungal, their uncle, was till lately proprietor of the remaining 6½ anas; but had sold half of this share to Chunder Naraen, the defendant in the suit. The claim on the part of Ramrutun Sing, &c. was for possession of the portion sold, as purchasers at the price stipulated with the defendant, on the ground that they, as sharers in the zemindary, had the right of pre-emption. Judgment went against them in the Zillah Court. In appeal to the Sudder Dewanny Adawlut, the case was thus stated to the pundits for their opinion: An ancestrel zemindary has been divided into two distinct shares; registered in separate names; and separate engagements being executed, the revenue of each portion is paid separately. Supposing the proprietor of one of these portions has occasion to sell part of the lands thereof; and sells them to a stranger; and the proprietor of the other portion offers to make the purchase himself, and protests against the sale to the stranger; is such sale to the stranger valid or not? One of the pundits of the Sudder Dewanny Adawlut declared, that the sale was not valid; the other that it was. A third pundit was called in, who held that the sale was valid. The Sudder Dewanny Adawlut (present C. Stuart, F. Speke and W. Cowper) affirmed the judgment passed against the claimants. (a)

(a) The right of pre-emption claimed in this case, is founded on ideas taken from the Moohummudan, and not from the Hindoo law; and carried even further (according to notions so generally prevalent throughout the country as to amount perhaps to established custom) than the doctrine of the Moohummudan law itself countenances. It is so much recognised, that in other suits which have since come before the Court, the defendants, though Hindoos, have admitted the principle on which the pre-emption was claimed, but rested the defence on

1792.

Feb. 23rd.

ESHANCHUND RAI, Appellant,
versus
 ESHORCHUND RAI, Respondent.

A gift, in the nature of a will, was made by a Hindoo zemindar, settling the whole of his zemindary on the eldest of his four sons, subject to a pecuniary provision for the younger ones. At the suit of one of the younger sons after the zemindar's death, for a fourth share of the estate, under the Hindoo law of inheritance, adjudged, that the disposition made by the zemindar was good.

IN the year 1781, Kishenchund, zemindar of Nuddea, by a deed of gift executed shortly before his decease, reciting, that he was infirm and approaching to his end; that his zemindary (termed by him his Raj or principality) had never been divided; and that he wished to prevent quarrels respecting it among his sons, after his death; settled the whole zemindary with its honors on Sheochund, the eldest of his four surviving sons, with pecuniary provisions for the three younger, and for the adopted children of two other deceased sons, payable out of the *moshahira*, or proprietary income of the zemindary. The eldest son was accordingly put in possession of the estate; and at his demise was succeeded by Eshorchund, his son. In August 1789, Eshanchund, one of the younger sons of Kishenchund, brought this suit in the Zillah Court at Nuddea, against his nephew Eshorchund, for a fourth share of the zemindary, as one of the sons of Kishenchund, on the ground that by the Hindoo law of inheritance, each of the sons was entitled to a portion; that the disposition made by Kishenchund was not a gift, and at all events that he had not by law power to make one: against which the defendant pleaded his title to the whole estate, under the deed in his father's favour. And the question in the case (independently of the point as to whether the zemindary was or was not subject to division) was whether the zemindar was legally empowered, or not, to make the gift pleaded by the defendant. Numerous pundits, of different parts of the country, were consulted; and, according to the majority of their opinions, by which whether the zemindary had been previously exempt from division or not, the gift made by the zemindar, settling the zemindary on the eldest son, with a provision for the younger ones, was declared legal. The Judge of Nuddea, maintaining the validity of the gift, and of the title derived from it, decreed the whole zemindary to be the right of the defendant, subject to a pecuniary provision for the plaintiff. And the Sudder Dewanny Adawlut, in appeal (present C. Stuart, F. Speke and W. Cowper), affirmed his decree. The opinion delivered by two distinguished pundits, *Jayramat'h* and *Kirparan*, was founded on the following reasons: 1st, that, according to law, a present made by a father to his son, through affection, shall not be shared by the brethren: 2nd, that what has been acquired by any of the enumerated lawful means, among which inheritance is one, is a

other grounds, such as a tender, made and refused, before the sale was completed to a stranger. The Moohummudan law allows the right of pre-emption to a partner in the property of the land sold; to one participating in the immunities and privileges of it; and to a neighbour. (*Hedaya*, Book 38, Ch. 1.) It was here claimed after a division and separation of shares, on the ground of former partnership, and not specifically on that of vicinage. Whether the custom of the country would have supported this claim is questionable. It most probably would in any case in which the Moohummudan law maintains the right. But as the decision of this suit was made to rest on a question of Hindoo law, there is no doubt that the opinion which governed the decision was in strictness of law correct. (See *Jimuta Vahana*, Ch. 2, § 81.)

fit subject of gift: 3d, that a coheir may dispose of his own share of undivided property: 4th, that although a father be forbidden to give away lands, yet, if he nevertheless do so, he merely sins, but the gift holds good: 5th, that *Raghunandana* in the *Dayatitwa*, v. Eshorchund Rai, restricting a father from giving lands to one of his sons, but clothes, jewels and ornaments only, is at variance with *Jimuta Vahana*, whose doctrine he espouses, and who only says, that a father acts blamably in so doing: 6th, that a principality may lawfully and properly be given to an eldest son. (a)

1792.

Eshan-
chund Rai,
v. Eshor-
chund Rai.

PRANKISHEN SING, Appellant,

versus

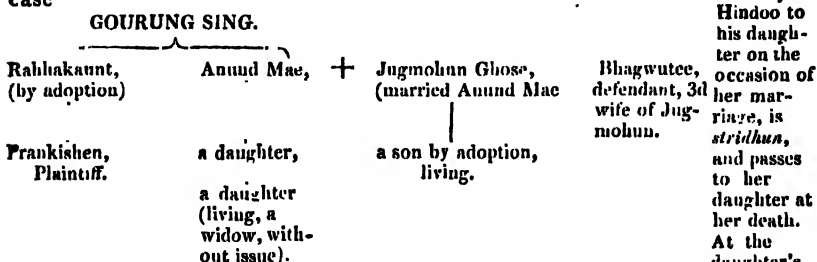
MUSSUMAUT BHAGWUTEE,

(Widow of JUGMOHUN GHOSE,) Respondent.

1793.

April 25th.

THE following is a sketch of the family of the parties in this case:



In the Bengal year 1161, Gourung Sing made over to his daughter Anund Mae, on her marriage with Jugmohun, a talook and tank, by a deed of gift, reciting, that he separated it entirely from his own possessions; that he made it over to his said daughter; that she was to get it registered in her husband's name, and hold it as her property. The talook was registered in the *Khalsa* in the name of Jugmohun; and a *sunnud* was granted conformable to the terms of the gift, by the existing government. Anund Mae died in 1163, without issue male; but left a daughter,

(a) Admitting the father's disposition of his estate in favour of his eldest son, to have been an improper exercise of power on his part, as possessor of the hereditary patrimony, still the validity of a gift actually made by a father is affirmed by *Jimuta Vahana* (Ch. 2, § 29 and 30). For since the gift of the entire estate to a stranger would have been valid, (however blamable the act of the giver might be), the donation in favour of one son, with provision for the support of the rest, would seem to be equally valid according to the doctrine received in the province of Bengal. And after extending to the case of sons, no less than to that of strangers, *Jimuta Vahana's* position, respecting gifts valid, though made in breach of the law, it becomes necessary to the consistency of the doctrine equally to maintain, that a father's irregular distribution of the patrimony at a partition made by him in his life-time, in portions forbidden by the law (*Jimuta Vahana*, Ch. 2, § 17), shall in like manner be held valid, though on his part sinful. No opinion was taken from the law officers of the Sudder Court in this case. But it has been received as a precedent, which settles the question of a father's power to make an actual disposition of his property, even contrary to the injunctions of the law, whether by gift, or by will, or by distribution of shares.

1793. and that daughter's husband. The daughter died in 1176, leaving a daughter, now living a widow without issue. Gourung Sing died in 1164, leaving an adopted son Radhakaunt; who died in 1149. Jugmohun died in 1196, leaving an adopted son, and Bhagwutee, his third wife. It would appear that after the death of his wife Anund Mae, Jugmohun held the property in question till his decease; and that it was then taken possession of by his widow Bhagwutee, as his heir. At the suit of Prankishen against her, in the Dewanny Adawlut of Moorsshedabad for the right to the property, judgment went for the defendant: in appeal from which judgment to the Sudder Dewanny Adawlut, the question was, who was the right heir to this property of Anund Mae at her demise? On this point the pundit was called on to explain the law; and the answer of Radhakaunt pundit was this: Upon the death of Anund Mae the property devolves to her daughter. It comes under the description of *stridhun*, and as such devolves to the daughter. But it is not the *stridhun* of the daughter, and upon her death it will not go to her daughter, but to the brother of her mother; and if he is not living to his son.

Prankishen
Sing, r. Mus-
summant
Bhagwutee.

The Sudder Dewanny Adawlut (present Earl Cornwallis, F. Speke, W. Cowper, and T. Graham), adjudged, that the claimant should recover the property; and passed a decree accordingly, reversing that of the Zillah Judge. (a)

1794.

NUNDA SING, Appellant,

versus

April 10th

MEER JAFIER SHAH, Respondent.

Suit for lands, to which the defendant pleads a title under a deed of composition for homicide, and certain other instruments. And the Sudder Dewanny Adawlut maintain his title.

JAFIER SHAH was plaintiff in this case, in the Dewanny Adawlut at Tirhoot, and Nunda Sing defendant. The suit was for the mouza Alahdadpore, containing about 1,000 beegas of *mal-guzary* land, as being the plaintiff's right by inheritance. The defendant rested his title on three deeds; 1st, *Sunudi khoon beha*, or grant of retribution for the blood of Soobha Sing, grandfather of the defendant, by Nusrodin, maternal grandfather of the plaintiff, to Adhar Sing, the defendant's father, for 100 beegas, *malikona* land in mouza Alahdadpore, dated in the *Fuslee* year 1149: 2nd, an *ikrarnamēh*, by the plaintiff, confirming the above, dated 1188: 3d, a *hibehnamēh* from the plaintiff to the defendant

(a) The property having been given to Anund Mae by her father, on the occasion of her marriage, was undoubtedly her *stridhun* (*Jimuta Yuhana*, Ch. 4, Sect. 1); and should have devolved, upon her death, on her daughter, whether unmarried, married, or widow. (*Ibid.* Sect. 2, § 9, 12, and 22.) But on the demise of that daughter, the land being, in respect of her, an inheritance, and not the peculiar property termed *stridhun*, it would not pass to her daughter, being a childless widow (*Jimuta Yuhana*, Ch. 11, Sect. 2, § 3); but to the next nearest heir. This appears to be the ground of the opinion delivered by Radhakaunt pundit in this cause; and it supposes the childless widow to have been so at the time of her mother's decease; for if she had been then unmarried, or if her husband had been living, she would have succeeded to her mother's property of every sort, in preference to the mother's brother or his son; (*Jimuta Yuhana*, Ch. 11. Sect. 2,) who could only have come in after her decease. (*Ibid.* § 30.)

running thus, "I hereby declare that I make over the village of Alahdadpore, hitherto mine and possessed by me, to Nunda Sing, son of Adhar Sing, son of Soobha Sing; and constitute him *mulik* and *mokuddim*," dated 1191. The validity of this, as a deed of gift, was not admitted by the plaintiff, (though there does not appear any denial of a gift having been made); and he moved that the *moulavee* of the Court might be consulted, whether such a deed was of any avail; and whether, if it were, the gift made by it might not be resumed. An opinion was taken accordingly in the Zillah Court from the Moohummudan law officer, who remarked, that the deed had no witnesses, and was deficient in legal form; that supposing all requisite forms observed, a gratuitous conveyance of property to a stranger would not hold good; for, provided the donor and donee were in existence, and the thing given remained, without accession, the gift was resumable. Judgment went against the defendant in the Zillah Court.

1794.

NundaSing.
v. Meer Ja-
fier Shah.

In appeal to the Sudder Dewanny Adawlut, questions were put to the Moohummudan law officers, 1st, as to whether the deed of 1191 was a legal voucher for a gift, and whether the donor might retract such a gift; 2d, whether the deeds of 1149 and 1188 were good proof of a title. The answers returned were these; 1st, gift, in law, depends on tender and acceptance; on one person saying 'I have given,' and the other answering 'I have accepted.' And seizin of the donee is necessary to complete the gift. The modes of establishing a gift are three; by evidence of credible witnesses; by the admission of the defendant; or by his declining to make oath to his denial. A deed of gift is solely for the purpose of corroboration, and by way of record: by reason of the probability of forgery, it is not a sufficient voucher, unless indeed a copy of it be in the cazee's office. For these reasons, in the present case, the gift is not established by the deed; and, should a gift be proved, it may be retracted from a donee who is a stranger; provided the donor and donee are both alive; and no consideration was given by the donee; and no inseparable increase has been made by the donee: 2nd, a paper (or deed), singly, is not considered in law as a voucher: but should it be established, that Nusrodin gave the 100 beegas *malikana* land to Adhar Sing, the father of Nunda Sing, as the price of blood of Soobha Sing his grandfather, and that Jafier Shah afterwards measured it out and delivered it over, Nunda Sing will be entitled to the property in the 100 beegas stated.

After receiving these opinions of their law officers, the Sudder Dewanny Adawlut (present Sir J. Shore and Council), set aside the judgment of the Zillah Court; and decreed, that the deed executed in 1149 by Nusrodin to the appellant's father, and the two deeds executed by the respondent in the *Fuslee* years 1181 and 1191, the former confirming the grant of 1149 for the *malikana* land, and the latter transferring the *milkeut* and *mokuddumeut* of the remainder of the village Alahdadpore, should be maintained; and the whole village be declared the right of the appellant. (a)

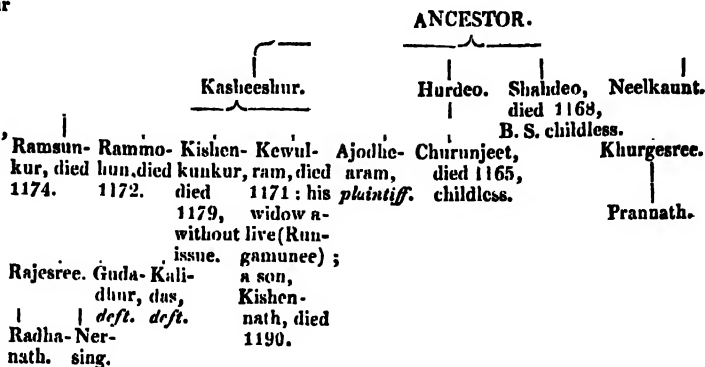
(a) Composition for murder is allowed by the Moohummudan law, and the agreement for it becomes a binding contract. (*Hedaya*, vol. 4, p. 99).

CASES IN THE SUDDER DEWANNY ADALUT.

1794. GUDADHUR SERMA, and KALIDAS SERMA, Appellants,
versus
 Oct. 30th. AJODHEARAM CHOWDRY, Respondent.

In a zemindary acquired by one of four brothers living together, either with aid from joint funds, or with personal aid from the brothers, two fifths declared the share of the acquirer, and one-fifth the share of each of the others. Division of the zemindary made accordingly among the heirs and descendants of the brothers.

THE following is a sketch of the family of the parties in this case:—



Kasheeshur, Hurdeo, Shahdeo, and Neelkaunt were four brothers, living together. Kasheeshur, by his own industry, acquired a zemindary, viz. 5 anas of pergunnah Choura; which, as yet, had not been divided. Kasheeshur died, leaving his three brothers above mentioned; and five sons, Ramshunkur, Rammohun, Kishenkunkur, Kewulram, Ajodhearam. Hurdeo then died, leaving a son, Churunjeet. Then Shahdeo died, without issue. Then died Kewulram, fourth son of Kasheeshur, leaving a son Kishennath; and a widow Rungamunee, mother of Kishennath. Rammohun then died, leaving two sons, Gudadhur and Kalidas. Then died Ramshunkur, leaving a daughter, Rajesree, and two sons of that daughter, viz. Radhanath and Nersing. Then died Churunjeet, son of Hurdeo, without issue. Then died Kishenkunkur, without issue. Neelkaunt then died, leaving a daughter, Khurgesree; which Khurgesree, after her father's death, had a son, Prannath. After this, in 1190, Kishennath died without issue. The survivors of the family at the time of the present suit, were Ajodhearam, son of Kasheeshur; Gudadhur and Kalidas, sons of Rammohun; Gungamunee, widow of Kewulram; Rajesree, daughter of Ramshunkur; Radhanath and Nersing, sons of Rajesree; Khurgesree, daughter of Neelkaunt; and Prannath, son

The right of retracting gratuitous donations to strangers, in the life-time of the parties, unless some improvement or increase have been incorporated in the thing, or it have passed into other hands, is recognised by the law (*Hedaya*, Book 30, Ch. 2): and the reason of the Court's judgment not being stated, it does not appear on what grounds the right was disallowed in this case, for the excess beyond the original composition for homicide.

The ideas of Moohummudan lawyers on the force of written evidence may be seen in the law opinion delivered by them in this case. Deeds can have little efficacy after the death of witnesses, unless registered.

of Khurgesree. The question was, what division was to be made of the zemindary; and the following opinion was given by Radha-kaunt pundit: 1st, "there having been four brothers living together in one family, of whom Kasheeshur was the eldest; if, without there being a paternal inheritance, or without the use of joint property, or without the labour or assistance of the brothers, he (Kasheeshur) acquired a zemindary, the other brothers would have no title to share in such zemindary. Should there have been a paternal inheritance, or an expenditure of joint funds; or should the brothers have lent their exertions, then the zemindary being divided into five parts, Kasheeshur, the acquirer, would take two, and the other brothers one each: 2nd, on the death of Kasheeshur, his five sons inherit his portion, divided into equal parts; on the death of Kasheeshur's son Rammohun, his (Rammohun's) two sons, Gudadhur and Kalidas, inherit their father's share, in equal portions: 3rd, the share of Kasheeshur's fourth son, Kewulram, on the demise of Kewulram's son Kishennath, should Kishennath have left no daughter, falls to his mother Rungamunee: 4th, on the demise of Ramshunkur (son of Kasheeshur), his daughter Rajesree inherits her father's portion, and on her death her two sons succeed her: 5th, Kasheeshur's son, Ajodhearam, being alive at the decease of his brother Kishenkunkur, should the latter not have left a mother, his full brother Ajodhearam receives his portion: 6th, on the death of Kasheeshur's brother Hurdeo, his (Hurdeo's) son Churunjeet inherits his father's portion; and on his decease, should he have left no brother, his father's full brother, Neelkaunt, the only survivor, will be entitled to that share: 7th, on the death of Kasheeshur's brother, Shahdeo, should he (Shahdeo) not have left a mother, his full brother Neelkaunt will inherit his share; and on the death of Neelkaunt, his daughter Khurgesree will inherit her father's portion."—It appears to have been asserted that Neelkaunt had resigned all concern in the zemindary, and that the three females Rajesree, Rungamunee, and Khurgesree, received a maintenance; the two former in lieu of their shares, which they had resigned. And a further opinion was taken on the point, which was this, "supposing that the male sharers contributed to the maintenance of Rungamunee; if she (Rungamunee) did not renounce her claim, she will, at a division, be entitled to the share of Kishennath, her son. If Rajesree received some lands, and renounced her claim to share, she will not be entitled to her father's share; but if she reserved her claim, then she will be entitled to her father's share. If Neelkaunt, the father of Khurgesree, relinquished his share on condition of receiving a maintenance, Khurgesree will receive the same." But evidence examined as to the facts, on the supposition of which this opinion was taken, did not prove them; and there was ground to presume that the contrary was the case. The Sudder Dewanny Adawlut determined (present Sir J. Shore, F. Speke and W. Cowper) that the decree of the Dinapore Adawlut (from which the case came before them in appeal), and which adjudged to Ajodhearam, (who sued for a division of the zemindary) 3 anas, 6 gundas, of the 5 anas, should be set aside; that the 5 ana zemindary, in pursuance of the pundit's opinion, should

1794.

Gudadhur
Serma, and
Kalidas
Serma, v.
Ajodhearam
Chowdry.

CASES IN THE SUDDER DEWANNY ADAWLUT.

1794. be adjudged to the heirs of the four brothers, Kasheeshur, Shahdeo, Hurdeo and Neelkaunt, in the following proportions; viz. to Khurgesree, as heir to her father Neelkaunt, the shares of Shahdeo, Hurdeo, and Neelkaunt, 3-5ths, or 9-12; and to the heirs of Kasheeshur 2-5ths or 6-8: these 6-8 to be allotted to the heirs of Kasheeshur in the following proportions, viz. to Gudadhur and Kalidas, appellants, 1-5th; to Ajodhearam, the respondent, 2-5ths; to Rungamunee 1-5th; and the same to Rajesree. (a)

1795. **MUSSUMMAUT RUNNOO, Appellant,**
versus
JEO RANEE, Respondent.
 April 8th.

Property, real and personal, having been given by a Hindoo to his concubine, and descended at her death to two surviving daughters; on the demise of one daughter, the sister takes her share: the lawful wife of the father has no claim.

JEO RANEE, the original plaintiff in this case, was the widow of Raja Moorleedhur: and Runnoo, the defendant, was one of two daughters of Moorleedhur, by Munuk, a concubine. Moorleedhur, during his life, had given to Munuk certain lands and personal property; to which, on her death, her two daughters, Sukhoo and Runnoo, succeeded; and, on a dispute with the Ranee, had a judgment in their favour, from the Patna Council, for their mother's property. Afterwards Sukhoo died, without issue. Her share of the property of her mother was the property now in contest; which was claimed by the father's widow on the ground (as insisted by the plaintiff) that, after the death of Sukhoo, she, as the lawful wife of the Raja, was entitled to the reversion of the property. And judgment appears to have gone in her favour in the Patna Court. But in appeal to the Sudder Dewanny Adawlut, after an opinion had been taken from the pundits, according to which it appeared, that the property given by the Raja to Munuk, as a voluntary donation, descended at her demise to her daughters; and the moiety of it, now in question, before appertaining to Sukhoo, was inheritable at her demise by Runnoo, as the heir at law; the Court determined, that the respondent had no title to this property, given voluntarily by the Raja without any stipulation of reversion; and inherited by Sukhoo from her mother. The Sudder Dewanny Adawlut therefore (present F. Speke) gave judgment against the claimant, reversing the decree of the Patna Court. (b)

(a) The law opinion and decision in this case are practical illustrations of a number of points of Hindoo law, neither intricate nor uncommon. 1st, The allotment of a double share to the person by whom an acquisition is made, with aid, however, from the joint funds (*Simuta Vahana*, Ch. 6, Sec. 1, § 28). 2d, Equal participation of sons succeeding to their father (Ch. 3, Sec. 2, § 27). 3d, The mother's succession to her son leaving no widow, nor issue male or female (Ch. 11, Sec. 4). 4th, the daughter's succession to one leaving neither male issue, nor a widow; provided such daughter be mother of a son, or likely to become so (Ch. 11, Sec. 2, § 3). 5th, The full brother's inheritance from his brother (Sec. 5). 6th, The uncle's succession on failure of nearer heirs. (Sec. 6, § 5, 8, 9).

(b) The property had been alienated by gift; and the widow of the giver, as his heir, had no legal pretension to the succession or reversion of such property on the death of a daughter of the person to whom it had been given. Her claim was therefore very rightly rejected. But in failure of what heirs, or in preference

KULLEAN SING (Attorney for the widows of SOODEE SING), 1795.

Appellant,

versus

April 23rd.

KIRPA SING and BHOLEE SING, Repondents.

THIS was a suit brought on the part of the widows of Soodee A zemindar Sing, in the Dewanny Adawlut of Tirhoot, against Kirpa Sing and adopted one Bholee Sing, for certain villages, the landed estate of Soodee Sing, by right of succession to him on his demise without issue. verbal declaration in the presence of witnesses, but without any religious rite or ceremony; and the person so adopted was acknowledged after the zemindar's death as his heir, at the obsequies. Held, that this adoption was good; and the son adopted in (Karta Pootr) takes the inheritance exclusively, property real and personal, hereditary and acquired.

The defendant, Bholee Sing (for the other did not appear through- out the cause) pleaded a title to the estate, as adopted son of the deceased; and evidence was gone into as to the fact of the adoption: by which it appeared to be proved, that Soodee Sing, a short time before his death, made a verbal declaration, in the presence of several persons, that he adopted the defendant: but without any religious ceremony or observance; that, after Soodee Sing's demise, the defendant performed the obsequies, and was acknowledged as the heir; and that a turban, in token of his succession, was bound round his head, by direction of the elder widow. On this evidence to the adoption, judgment went for the defendant in the Zillah Court.

In the Provincial Court of Patna, three further witnesses were examined, whose evidence went to confirm that before given. The Court put a question to their pundit relative to the adoption; and to the forms generally required by law to be observed in making such adoptions: so as to establish the fact of adoption having duly taken place. On the latter point, the answer of the pundit recited as follows:—Let the person (intending to adopt) first consult a Brahmin, and, having discovered a propitious moment, let him, in the presence of the Brahmin, and of some friends or relatives, place something in the hand of the person to be adopted, and say to him "be thou my adopted son—my goods and effects shall become thy property:" the person adopted will reply, "I agree to become thy son." By the *Shaster* it is essential, that the transaction be with the free will and consent of the adopter and adopted. The ceremony of placing something in the hand of the adopted, and it being done in the presence of a Brahmin, is observed merely for outward form, and in compliance with custom. Should this be omitted, and the consent of the adopter and adopted be nevertheless manifest, the adoption is good. The Provincial Court affirmed the Zillah decree.

In appeal to the Sudder Dewanny Adawlut, it was still insisted, that sufficient form to constitute adoption had not been observed; that at all events, an adopted son would not take both the hereditary and acquired property of the adopter; that, besides, there must be some provision for the widows. The Court applied to their pundits for an opinion, whether, under the facts in evidence, adoption was proved? whether an adopted son was entitled to the exclusive inheritance, or to what particular property of the adopter?

to what other successors, a sister inherits, is a question on which a difference of doctrine exists. (*Mitachara on Inheritance*, Ch. 2, Sect. 4, § 1, in the notes).

1795. and in what manner the law required that the widows should be provided for : to which the pundits replied, that the adoption was valid : that whatever property Soodee Sing left, hereditary or acquired, real or personal, devolved exclusively on Bholee Sing ; but that it was incumbent on Bholee Sing to furnish the widow of Soodee Sing with the means of performing religious acts, and likewise to provide her with a maintenance, and cherish her like his own mother.

Kullean
Sing, v. Kir-
pa Sing, and
Bholee Sing.

The Sudder Dewanny Adawlut (present Sir J. Shore and Council) affirmed the decrees of the lower Courts, as far as concerned the landed estate for which the suit was brought ; but did not, in the present judgment, pass any decision as to the maintenance of the widows. (a)

MEER NUJEEB ULIAH, Appellant,

versus

MUSSUMMAUT KUSEEMA, Respondent.

The widow of a Moohummudan claims the estate of her husband, who died 26 years before, under a gift from him, in lieu of dower, (*hibeh-bil-iwuz*) dated two years before he died. No possession on her part since his death : and her son, in the interval, by her direction, had sued and obtained judgment as heir to his father's estate. Such having been the case, the law of the firers hold that the widow is estopped from claim-

KUSEEMA BEEBEE, the original plaintiff in this cause, was the widow of Gholam Ghose, proprietor of the talook Mustaphapore, forming a half share of tuppa Khanzadpoie. &c. in the Zillah Tirhoot. She brought her action in the Tirhoot Dewanny Adawlut, in April 1793, or *Bysakh* of the *Fuslee* year 1200, against Nujeebollah, for the right to the above lands, under a deed of (*hibeh-bil-iwuz*) from her husband, dated in the *Fuslee* year 1174 ; in which deed it was set forth, that he had settled on his wife two lacs of rupees as dower, then demandable from him ; that, in lieu of 5,000 rupees of it, he thereby made over to her the lands now disputed. The defendant pleaded that the plaintiff had no just claim : that, in 1194, the lands were sold, in discharge of balance of revenue due from his (the defendant's) father, then *sudder* farmer, to one Kootub Zemaun ; by whom they were sold in 1196, to one Ahmud Ali Khan, who had since held them. The plaintiff proved the execution of the deed of gift ; and brought one of three subscribing witnesses to an *ikrarnamah*, or written acknowledgment, by her husband, dated in the same year, declaring that he had delivered possession to his wife ; and had accepted the office of manager of the lands on her part. But it did not appear that the plaintiff had ever availed herself of her title under the gift, from 1176, when her husband died, till the institution of this suit in 1200 ; and it appeared too that, in the interval, Gholam Dustgeer, the plaintiff's son, had sued in the Patna Dewanny Adawlut, as heir to his father, against Moizodeen, proprietor of a share of Khanzad-

(a) This was an adoption of a *Kritrima* son (vulg. *Kurta Pootr*), a form of adoption in use throughout *Mithila*, which comprehends Tirhoot and the adjoining districts. The form, as described in the answer of the pundits to the Provincial Court, is precisely that directed in a passage cited in a note to the *Mitacshara*. (Ch. 1, on Inheritance, Sec. 11, § 17.) There is no doubt that this adopted son is heir, as declared by the answers of the pundits to the Sudder Court, to all the property real or personal, hereditary or acquired, of his adoptive father.

pore, &c. (and who, after Gholam Ghose's death, had managed his share of it); and obtained a judgment, on the defendant's admission of claim, in 1184, for the *malikana* of past years, and possession of his father's share; and that in 1185, he obtained a judgment from the Patna Council, directing, that Moizodeen, according to an award given in arbitration, should deliver over to him 651 beegas of land in lieu of some he had sold while he managed Gholam Ghose's share. The sale pleaded by the defendant appeared to have been a *bye-bil-wufu*, executed in 1194, to the defendant's father, in a feigned name, for a sum stated to be arrears of revenue, by three persons, Noor Ali, nephew of Moizodeen; Gholam Jelanee, a son of Gholam Ghose, by another wife; and one Moolhummedee; which three persons were therein alleged to be proprietors; but were then holding apparently, as farmers, under Burkut Ullah, *aumil* of the pergunna Mehoe. The Zillah Judge set aside this sale, as obtained by compulsion, as far at least as respected the signature of Gholam Jelanee: independently of the question as to the competency of these persons to make the sale; and judgment went for the plaintiff in the Zillah Adawlut, under the deed of gift from her husband: which judgment the Provincial Court of Patna affirmed in appeal.

In further appeal by the defendant to the Sudder Dewanny Adawlut, it was inserted, that in the *bye-bil-wufu* sale there was no compulsion, which the appellant would prove by other witnesses: that under the alleged gift, the widow never had possession during 27 years; wherefore the deed could be of no effect: that the decree for the plaintiff's son, and her acquiescence in his suit, were incompatible with any claim of her own; for she thereby virtually admitted that the property was heritage left by her husband, and not settled by gift on her before his death. The Court proposed the following questions to their law officers, to be answered by them after perusing the proceedings: 1st, could Gholam Ghose, having a son living at the time, legally execute to his wife the deed of conveyance termed *hibeh-bil-iwuz*? 2nd, if he could legally execute it, was delivery of possession necessary to give effect to the deed; and if so, is the requisite delivery of possession proved? 3d, if delivery of possession was not necessary; or, if it was necessary, and sufficiently proved; has the widow now forfeited her title, or not, to the property which the deed purports to convey, by having omitted to avail herself of her title under it, for 24 years, which elapsed between her husband's death in 1176, and the institution of this suit in 1200, and by having allowed her son, Dustgeer, to sue in the Patna Adawlut and Provincial Council, as heir to his father's estate, and obtain judgments in his favour? 4th, supposing the title of the widow to remain valid, notwithstanding the above objections, could any sale of the estate, made by another person subsequent to the date of the deed in the widow's favour, and after her husband's death, whether for the discharge of a balance of revenue, or other purpose, be valid in Moolhummadan law?—The answers to these questions were, 1st, Gholam Ghose, notwithstanding he had a son alive, could convey his property to his wife, *hibeh-bil-iwuz*. 2nd, lawyers distinguish between *hibeh-bil-iwuz*, or gift for consideration, and *hibeh-ba-shirt-ool-*

1795.

ing under a gift from her husband; though she may come in for her share as one of the heirs. To the validity of *hibeh-bil-iwuz* or gift for consideration, which in effect is sale, seizure of the donee is not requisite in Moolhummadan law.

1795. *iwuz*. In a case of *hibeh-bil-iwuz*, which is in fact sale, delivery of possession is not requisite. This point the author of the *Nehaya* (a commentary on the *Hedaya*) has illustrated. By the wife's having neglected to avail herself of her title under the gift, the title is not invalidated; but her allowing and directing her son to sue as principal, and on his own part, for the proprietary right in the lands, as son of Gholam Ghose, is incompatible with her claim. Yet her right, and that of her son Dustgeer, as heirs of Gholam Ghose, are not affected. 4th, should one sell the property of another without his order, that is, without due power so to do, and the owner not afterwards confirm the sale, it cannot hold good.—In conformity with the above opinion, the Sudder Dewanny Adawlut determined (present Sir J. Shore, P. Speke, and W. Cowper), that the respondent, having formerly authorized and directed her son to sue in his own name as heir to his father, could not now take advantage of the deed of gift to herself from her husband, although she might share as joint heir in the property left by her husband; that, as this suit was brought merely under the deed of gift; and the purchaser and actual possessor of the lands had not been made a party; the respondent could have no judgment now passed in her favour. The decrees of the Courts below were therefore reversed by the Sudder Dewanny, who thought it necessary to specify in their judgment, that the landed estate of Gholam Ghose was the property of his heirs at law, notwithstanding any transfer made of it, since his death, by persons not duly authorized. (a)

1796.
March 31st

JAFIER KHAN, Appellant,
versus
HUBSHEE BEEBEE, Respondent.

THIS was a suit brought by Hubshee Beebee in the Civil Court for lands, to which the defendant pleaded a title under a gift from his wife lately deceased, made some years before her death, the question was whether there had been possession under the gift, sufficient to give it validity in

of Zillah Dinajpore, in 1792, against Jafier Khan, for certain lands stated to have been held by the plaintiff's sister Tajoo Beebee, wife of the defendant, as the joint property of the two sisters: to which suit the defendant pleaded, that he held the property claimed under a deed of gift from his wife, executed in his favour many years before her death; at the date of which gift the property was wholly her's. Judgment was given for the plaintiff in the Zillah Court; but it was reversed in appeal by the Sudder Dewanny Adawlut (present P. Speke and W. Cowper), to whom it appeared, after taking an opinion from their law officers, that the deed of gift to the defendant was valid; that it was executed by Tajoo Beebee at a time when she was sole owner of the property conveyed by it, no other having an interest therein; that two sisters of Tajoo

(a) On a principal point of law in this case, that a gift for valuable consideration is in fact a sale, and does not require for its validity delivery of possession, the commentary of the *Hedaya* is quoted in the *fatwa*. The subject is not noticed in the text of the *Hedaya*. The other points in this *fatwa* rest on obvious principles.

Beebee, to whom, jointly with her, certain lands; including those in question, had been allotted by a grant from the Raja of Dinajpore, had previously received separately their respective shares. 1796.

The principal question in appeal, as to the validity of the gift, was relative to the possession of the appellant under it. Further evidence was taken in the Zillah Court on this point by order of the Sudder Dewanny Adawlut; but nothing very satisfactory was ascertained; for, the lands being *lukhiraj*, there had been no engagement for revenue; and no registry had been made of them; and it was not ascertainable in whose name they had been held subsequently to the gift. But so far appeared, that the wife, after the execution of the gift, had directed the tenants to pay their rents to the husband; which might be considered as delivery of possession; and that the husband, for a time, granted leases, and received the rents in his own name. But it was clear that the seal of the wife had been afterwards occasionally current; and particularly that she had managed the business of the talook in her own name, during her husband's absence. The law officers declared, that the possession of the husband for a few days, which was in proof, was sufficient to give legal validity to the gift; that the wife could not retract it; that a deed, which she had executed nine years after it, and one year before her death, declaring the gift of no effect, and making a devise in favour of her sister, the claimant, would not avail in law.

Another question, respecting the validity of a gift of joint property, under Moohummudan law, came incidentally under consideration in this case, though the decision did not turn upon it; and the following is an extract from an opinion given by the law officers: "In Moohummudan law, a necessary condition is, that property given be not attached to, or included in, the property of another (so as to be undefined): and if it be land, that the partition be determined by known boundaries: in which case alone the gift is perfect. (a)

RAJKISHOR RAI, and four others (Sons of KALICHURN RAI), 1896.
Appellants,
versus
Widow of SANTOODAS (Son of JYKISHEN RAI), Respondent. Oct. 26th.

KALICHURN, Jykishen, and Soobaram, were brothers. Soobaram died, leaving a son, Radhanath. Then died Jykishen, leaving a son, Santoodas. Then died Kalichurn, leaving five sons, Rajkishor Rai, &c. the original defendants in this suit. Kalichurn during his life conducted a banking house, which after his death, was carried on by his eldest son Rajkishor, in concert with the other brothers. Santoodas, the cousin of these (son of Jykishen), was occasionally employed in transacting business for Rajkishor, and, as well as his father, received money for his private

(a) The ground of the law opinion in this case may be seen in the *Hedaya*, Vol. 3, p. 291 and 293.

1796. expences from Kalichurn and Rajkishor; but does not appear to have received any specific share of the profits in trade; or to have been present at the balancing of the accounts; or to have been made acquainted with the profit or loss. The account books contain no mention of the parties, except that, in the *bukhy kuhra*, or day-book, disbursements for private expences are entered, which include the monthly expences of Santoodas and Radhanath; the latter of whom was at the time engaged in a separate business, independent of his cousins. The three brothers, Kalichurn, Jykishen, and Soobaram, all messed apart; as did also their respective heirs; but Santoodas and Radhanath continued to receive money for their private expences from Rajkishor, for more than twenty years after the decease of their fathers; until disputes arising, they each claimed a third share of the trade which had been managed by Kalichurn and Rajkishor, together with a third of the household effects, money, and jewels, possessed by Rajkishor; alleging, that these were held by him and his father, as joint and common property of the family; and resting their claim on the circumstance of no separation of property having taken place between them or their fathers, and Rajkishor or his father; and on their having continued to receive money for their expences from (as they termed it) the common fund managed by Rajkishor and his brothers. That Jykishen and Soobaram, or their sons Santoodas and Radhanath, had any coparcenary with Kalichurn or his son, or ever possessed any property jointly with them, was denied by Rajkishor and his brothers; who pleaded, that the property in their possession was the produce of the exclusive and separate industry of their father and themselves. These being the circumstances, the Sudder Dewanny Adawlut consulted their pundits, whether according to the Hindoo law of succession and partnership, the claim of Santoodas, the original plaintiff in this suit, against Rajkishor Rai and his brothers, was or was not maintainable: to which the pundits replied, in substance, that under the circumstances stated, the claimant, having messed apart from the defendants, having received maintenance, but no share of the profits in trade, and never having advanced a claim till now, must in law be deemed separate, as far as respected family partnership, through no written declaration of separation should have been made; and that the claim in the present suit could not be maintained.

In conformity with this opinion, the Sudder Dewanny Adawlut (present P. Speke and W. Cowper), gave judgment against the claim, reversing a decree passed in favour of it in appeal, by the Provincial Court of Moorshedabad, and affirming one passed against it, in the first instance, in the Zillah Court of Rajshahi. (a)

(a) This was a question of evidence. The Hindoo law provides, that in case of a dispute as to the fact of a partition, recourse shall be had to presumptive proof in default of written and oral evidence (*Jimuta Vahana*, Ch. 14). The presumption, on the grounds stated by the law officers, was, that this family had long been separate in regard to property.

SRINATH SERMA, Appellant,

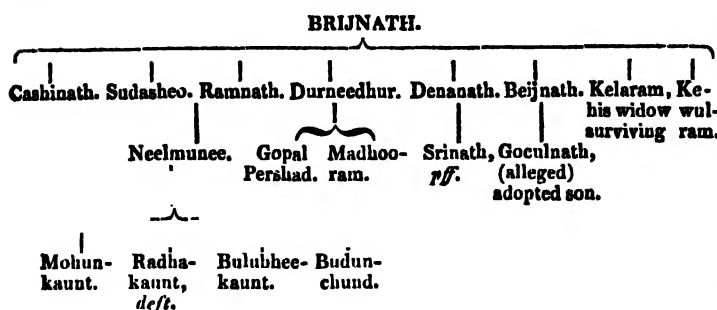
versus

RADHAKAUNT, Respondent.

1796.

Nov. 24th.

THE following is a sketch of the family of the parties in this case :—



An hereditary zemindary, managed many years by some one heir of the original zemindar for the benefit of the rest, they receiving portions of the profits, adjudged to be thus divisible (according to the Hindoo law), at the suit of one of the heirs Beijnath, for a division; viz. three sons of eight left by the zemindar, died without issue; but of these three one left a widow, now surviving; and one of the other five was adopted into another family, and thereby excluded from the paternal inheritance. The zemindary therefore divided into five parts, of which four fell to the heirs of the sons who left issue; and one to the widow of the son who left her heir.

Srinath was plaintiff, in the Zillah Court of Boglipore, against Radhakaunt. The suit was for a division of the zemindary of "8 anas pergunnah Akberpore," formerly the property of Beijnath, on the ground that it was hereditary property held, since the death of Brijnath, jointly by the heirs, though in the name only of one, who managed for the rest; to which the defendant pleaded, that it was exclusively his, by succession to the eldest son; who was alleged to have succeeded to the whole. Judgment went against the plaintiff in the Zillah Court; from which judgment the case came before the Sudder Dewanny Adawlut in appeal. The first question before the Court was, whether the zemindary was divisible among all the heirs of Brijnath, or was vested in the respondent exclusively; and the second, to what shares, supposing it divisible, the parties were respectively entitled. On the first point, it was thought necessary to cause some further evidence to be taken; and the pundits were then applied to, to give their opinion on the two questions, after considering the evidence in the case. Their opinion was in these terms: It appears from the depositions of the witnesses, as well as from the original documents, that the zemindary is hereditary, and has hitherto been held in coparcenary; and that the profits have been enjoyed in common by the parceners. Brijnath had eight sons; the eldest Casinath, the second Sudasheo, and the seventh Kelaram, died without issue; but the widow of the seventh is still living. The eighth son, Kewulram, is the only one adopted into another family. The zemindary is therefore divisible into five shares; each of the sons will severally inherit their father's portions; and the widow of the seventh son her husband's; as hereunder specified. Radhakaunt, Mohunkaunt, and Bulubheekaunt, sons of Neelmunee, and grandsons of Ramnath, the third son, will jointly receive one share. Budunchund, son of Madhoo-ram, grandson of Dhurneedhur and Gopalpershad, surviving son of Dhurneedhur, will jointly receive one share. Srinath, son of his heir.

1796. Denanath, the fifth son, will take one share. Goculnath, adopted son of Brijnath, will receive one share. The widow of Kelaram will receive one share.

Srinath Serma, v. Radhakaunt.

In conformity with the above opinion, the Court (present P. Speke and W. Cowper), determined that the eight ana zemindary divisible among the surviving heirs of Brijnath, in the proportions specified. And the usual proclamation having been made for other claimants, one only, Goculnath, came forward, as adopted son of Beijnath. But the respondent having contested the fact of his adoption, and made it necessary for him to establish it by evidence, no order was issued in his favour in this judgment. The Sudder Dewanny Adawlut merely decreed, that the heirs of the appellant (who had died during the appeal) should receive from the respondent a fifth share of the eight ana zemindary; with mesne profits of such share since the institution of the suit. (a)

1798.

March 29th.

KULSOOM KHANUM, Appellant,

versus

MIRZA MEHDEE, Respondent.

Altumgha lands were granted to a mother for the support of her family, and remained to them (a his family; together with arrears of each. The suit was dismissed in the Patna Court, as not cognizable under the rules of limitation then in force.

THIS was a suit brought by Kulsoom Khanum against Mirza Mehdee, in 1785, in the Dewanny Adawlut at Patna, to recover a third share of certain *altumgha* lands granted by a *firmann* in the name of Mah Khanum, her mother, widow of Alinukee Khan; and a third share of a Nizamut pension, granted to Alinukee Khan, and continued after his death, by Government, for the support of his family; together with arrears of each. The suit was dismissed in the Patna Court, as not cognizable under the rules of limitation then in force.

But in appeal to the Sudder Dewanny Adawlut, the Court (present W. Cowper) from further circumstances which appeared, considered the rules of limitation inapplicable; and under an opinion given by their law officers, viz. that Mah Khanum having died leaving a son Mirza Mehdee, and two daughters Kulsoom Khanum and Ameena Khanum, her estate was divisible into four shares, two of which fell to the son, and one to each of the daughters; the Court considered that the appellant was entitled, from

two full to the son, and one to each of the daughters. A pecuniary pension similarly divided. (a) Of the two questions put to the law officers, the first was a question of fact, the second only a question of law. According to the Hindoo law as prevalent in Bengal, within the limits of which a part of Boglipoore is situated, the widow of a coparcener who leaves no male issue is entitled to his share of the joint property. (*Jimuta Vahana*, Ch. 11, Sect. 1.) But according to the doctrine which prevails in Behar, in which province the remainder of Boglipoore is included, the widow would be entitled to maintenance only. (*Mitacshara* on Inheritance, Ch. 2, Sec. 1.) The other points which are touched on in the law opinion in this case, require no remark; except the exclusion of a brother who had been adopted into another family. This is in conformity to the law as received in both provinces with relation to a *Dattaca* adoption. (*Menu*, Ch. 9, v. 142.) It would be otherwise in regard to the *Kritrima* adoption, which is in use in North Bihar, and the contiguous districts of Boglipoore and Purnea.

the time of her separation from the respondent in the *Fuslee* 1798.
 year 1187, to a fourth share of the *altumgha* granted in the name
 of her mother Mah Khanum, for the maintenance of the family of *Kulsoom*
 Ahnukee Khan; which, at his death, in 1172 or 1173, consisted of *Khanum, r.*
 his widow Mah Khanum, his son Mirza Mehdee, his daughter *Mirza Meh-*
dee.
Kulsoom Khanum, and another daughter, who had since died,
 leaving issue. And the Court also consider the appellant entitled,
 from the above period, to a fourth of a pension of 92 rupees per
 month received by the father, which appeared to have been con-
 tinued by Government for the maintenance of his family. The
 Court accordingly, setting aside the decree of the Patna Court,
 adjudged a fourth share of the *altumgha* and pension to the
 appellant, with mesue profits of the one, and arrears of the other,
 since 1188; specifying, at the same time, that the decree regarded
 only the relative rights of the parties, which alone were before the
 Court; and had no reference to the continuance or otherwise of the
 grant, or pension, by Government. (a)

MOOHUMMUD SADIK, Appellant,

1799.

versus

MOOHUMMUD ALI, and others (Sons of MOHUBBUT ALI),
 Respondents.

Dec. 6th.

THIS suit was instituted in the former Adawlut of the city of If a Moo-
 Benares, by the late Mohubbut Ali, against Moohummud Sadik, hummudan
 to prevent the defendant's molestation of the plaintiff in the *town* assign prop-
 or superintendence of the tomb of Sheikh Moohummud Ali, property for a
 Huzeen, a Moohummudan saint, and of other buildings; which pious en-
 superintendence the plaintiff stated himself to have held thirty dowment;
 years, under an assignment from Moohummud Hoosein, executor and he (or
 to the will of Ali Huzeen; and under confirmatory *sunnuds* from his execu-
 the ruling powers of the time. The profits of the superintendence tor on his
 were stated to amount to about 400 rupees *per annum*. The de- part) ap-
 fendant, son of the executor, insisted, that the plaintiff had abused point a
 the trust, and that he had a right to displace him; which abuse and such
 trust the plaintiff denied. The plaintiff died during the original trustee
 trial of the suit before the former Court, at Benares, and was suc- (there be-
 ceeded by his sons; and a decision was passed in the present City ing no spe-
 Court, in February 1796, which directed, that the defendant, cial provi-
 agreeably to the order of the former Court, should confer the sion for his
 superintendence on either of the sons of Mohubbut Ali, whom successor)
 he might deem qualified; and should not dismiss him except on on his
 proof of misconduct to the satisfaction of the Court. death bed

The Provincial Court of Benares, in appeal, reversed the above bequest
 decision, after taking an opinion from their law officers; and de- is good in
 creed, that the sons of Mohubbut Ali should share the superin- law; and
 tendence amongst them, and the emoluments accruing; the heir of the sons
 the executor having no right of interference. entitled to
 the superin-
 tendence
 jointly, and
 to the law-

(a) As a question of Moohummudan law, this was a very simple case of inhe-
 rittance, (*Sirajiyjah*, p. 5.)

1798.

ful profits accruing from it; not subject to the confirmation of the ruling power, nor removable *quam diu se bene gesserint*; but on proof of misconduct, or breach of their trust, the ruling power shall appoint another or others in their stead.

Definition of *wukf*.

And of *towlent*. Appointment of the superintendent vested in the appropriator: on his demise, in his executor; then in the ruling power.

In appeal from the above decree by Moohummud Sadik to the Sudder Dewanny Adawlut, the proceedings were given to the Moohummudan law officers for their perusal and opinion; points on which the case appeared to the Court to turn, and on which the opinions of the law officers were required, being, 1st, whether the *towlent-namch* granted by the executor of Ali Huzeen to Mohubbut Ali (and his heirs), and confirmatory *sunnuds* obtained by Mohubbut Ali, from the King Shah Aulum; the Nabob Shujaodowla; the Raja Cheit Sing, zemindar of Benares; and the Company's Resident in the province (the two latter only of which mentioned the heirs of Mohubbut Ali); entitled the grantee, Mohubbut Ali, during his life, and entitled his heirs in general, or any of them, since his death (with or without the particular nomination of Mohubbut Ali), to the superintendence of the *dargah* of Ali Huzeen, and of the buildings and lands attached thereto; independent of any interference on the part of the executor or his sons; as well as independent of any appointment or confirmation by the Government: 2nd, in case the heirs or assignees of Mohubbut Ali were not entitled, on his death, to succeed him in the superintendence, whether the appointment of his successor was legally vested in the son of the executor, or in the Government; and, in either case, whether such appointment must be under any, and what restrictions, as to the person nominated. The law officers gave their opinion as follows: We have considered the proceedings in the case, and shall preface our *futwa* by stating, that *wukf*, according to the opinions of Yusuf and Moohummud (which on this point are adopted as law), implies the relinquishing the proprietary right in any article of property, such as lands, tenements, and the rest: and consecrating it in such manner to the service of God, that it may be of benefit to men: provided always, that the thing appropriated be, at the time of appropriation, the property of the appropriator; as is specifically stated in the *Bukr-i-rayik*. *Towlent* implies the consignment of the thing appropriated, by the appropriator, to another person, for the purpose of such person's applying it in the manner designed; and the appointment of the trustee or superintendent is vested in the appropriator, in order that he may confer the office on a person of integrity, morality, information, and œconomy; and, on the death of the appropriator, the power of appointing a superintendent is vested in his executor, or should he have left no executor, in the *cazee* and *hakim*, that is, the magistrate and the sovereign. It is stated in the *Bukr-i-rayik*, in a quotation from the *Futawa-soghra*, that in the event of the demise of the superintendent while the appropriator is in existence, the latter, and not the *cazee*, is authorized to appoint another superintendent; and that, if the appropriator be dead, his executor has a title superior to the *cazee*'s; and, in the event of the appropriator not having appointed an executor, the nomination falls to the *cazee* and *hakim*. We now proceed to state, that it appears that the spot on which Sheikh Ali Huzeen erected his tomb, was a rugged uneven jungle; and that the Sheikh, after clearing it, allotted part of it for a burial ground, and appropriated the remainder for a mosque; and that, contiguous to the spot in question, is an old apartment,

denominated the *astannah* (or abode) of *Fatima*, *Syudut-on-nisr*, 1799.
 and another called the *punja* (or hand) of *Shah Huzrut Murdan*.
 This is moreover specifically stated in the *Soorut-hal*, or written Moohum-
 statement, made out by the Sheikh himself; a copy of which is e Moohum-
 among the proceedings. Under the *towlent-nameh*, therefore, mu Ali,
 executed by the executor of the Sheikh, Mohubbut Ali was entitled and others.
 during his life to the superintendence of the tomb and appropriated
 ground, and was not removable by the sovereign, nor by the exe-
 cutor; especially as he had obtained confirmatory *sunnuds* from the
 ruling powers of the time. The superintendent having, on his A consign-
 death bed, assigned the superintendence of the tomb to his own ment or ho-
 sons, as proved by the evidence of witnesses, such assignment, quest of the
 according to good authorities, is valid. It is stated in the *Buhr*- trust by the
i-rayik, the *Tatarkhanee*, the *Keheera*, the *Hiimadea*, and the superinten-
Fusool-ool Amadea, that if the superintendent desire, on his death dent to his
 bed, to bequeath the superintendence to another, it is allowable sons, on his
 for him to do so: but he would not be authorized to appoint a law. death bed,
 successor in his life time, and during health; unless the consign- But not a
 ment of the superintendence to him have been general, that is, consign-
 with permission (from the appropriator or his executor, as he may ment made
 have received it from either), to confer it on another; in which health, un-
 case he may be authorized to appoint a successor during health, less he have
 It is likewise stated in the *Buhr-i-rayik*, that if the death of the obtained it
 superintendent happen subsequently to that of the appropriator himself
 who appointed him, the *cazee* shall appoint a successor. It is, power.
 however, stipulated as a condition, in the *Moojtuba*, that the
 superintendent shall not, on his death bed, have bequeathed it to
 any person; and that, in the event of his having bequeathed it,
 the *cazee* is not authorized to appoint. There are also other The trustee
 authorities to this effect, from which it is clear, that the superin- may be-
 tendent is authorized, on his death bed, to appoint a successor, queath on
 though the appropriator have not given him general permission. his death
 The sovereign, then, according to the best authorities, is not any express bed without
 authorized to remove the sons of Mohubbut Ali, and to confer power to that effect.
 the superintendence on Moohummud Sadik, unless it shall appear The ruling
 that they have been guilty of dishonesty with respect to the power may
 property appropriated, in which case the sovereign may remove remove the
 them, and appoint a person of integrity in their stead. The devisees on
 superintendence in question belongs to all the sons of Mohubbut proof of
 Ali, and is not the exclusive right of any one of them. The tem- misconduct.
 ple dedicated to *Fatima*, and the *Punja* of *Huzrut Shah*, not
 having constituted the property of Ali Huzreen, he having himself
 declared them to be ancient edifices, Mohubbut Ali was not en-
 titled to them under the *towlent-nameh* from the executor. But
 he might have had the superintendence of them, had it been con-
 ferred on him by the ruling powers; which, however, does not
 appear. The sovereign, therefore, may now, as shall be thought
 proper, relinquish the superintendence of these to the sons of
 Mohubbut Ali, or assign it to Moohummud Sadik, or any other
 individual.

In conformity with the above exposition of the law, the Court
 of Sudder Dewanny Adawlut (present W. Cowper) adjudged,
 that the superintendence of the tomb of Sheikh Ali Huzreen was

1799. vested in all the sons of the late Mohubbut Ali, and was to be held by them in common, with all appurtenances and just emoluments annexed to it, until they should be removed by Government for misconduct in the discharge of the trust confided to them. With respect to the sacred building dedicated to *Syudut-on-nisa*, and the *Punja* of *Shah Huzrut*, of which, as they were not the property of Ali Huzzen, the superintendence could not be legally conferred by the *towleut nameh* of his executor, and was now to be conferred as Government should think fit, it was directed, as they had been long under the superintendence of Mohubbut Ali, and were in his possession when this suit was commenced, that they should remain with the sons of Mohubbut Ali until Government should appoint a superintendent; or some other person should show a good title to the possession of them. It was further directed, that the heirs of Mohubbut Ali should be indemnified by Moohummud Sadik for all losses sustained by them or their father, in consequence of being molested by Moohummud Sadik in the exercise of the superintendence vested in them. (a)

1799.

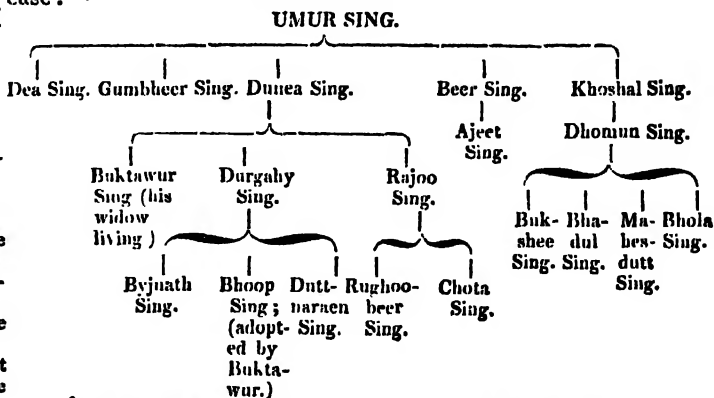
DUTTNARAEN SING, Appellant,

versus

Feb. 14th. AJEET SING, BUKSHEE SING, and RUGHOOBEER SING, Respondents.

At the suit of some of the younger members of a Hindoo family, for shares of the family estate, the legal distribution adjudged, on its appearing, that the estate was not the exclusive right of the elder branch, but that all the members, (who had held lands for their support as being sharers) were entitled to share; though hitherto no

THE following is a sketch of the family of the parties in this case : --



(a) The grounds of the opinion delivered by the law officers are fully stated in their *futwa*. The case is an illustration of the Moohummudan law concerning the nomination of a successor to a trustee for an appropriation or endowment termed *wugf*. No special provision having been made for the succession by the person who assigned the *wugf*, the trustee has power to bequeath the trust by will.

With respect to the mention made of the heirs of the trustee, it should be observed, that there at first appeared a question whether the heirs were not included in the deed of assignment; the wording of which was doubtful. But the law officers do not appear to have considered them included, under the terms of the deed; though they do not particularly notice the point in their *futwa*.

Ajeet Sing, Bukshee Sing, and Rughobeer Sing, brought the suit against Duttanaraen Sing, in the Zillah Court of Bhāngulpore, for shares of Tuppa Seroonjah, in pergunnah Pherkia, on the ground that this was the joint hereditary talook of the family. The defendant pleaded an exclusive title, as being descended from the elder branch of the family; which elder branch, he affirmed, had always held the estate, without the participation of the younger branches, who were only entitled to maintenance. The plaintiffs in reply, denied this title; as well as the fact of exclusive possession on which it was grounded: and the participation of the plaintiffs themselves appearing to the Zillah Judge to be proved by the testimony of the witnesses adduced by them, he consulted his pundit as to the shares to which the parties were respectively entitled; and gave judgment according to the distribution stated by the pundit; which judgment the Provincial Court of Patna affirmed in appeal; though it appears that several of the surviving heirs (not made parties to the suit) were not included.

In further appeal to the Sudder Dewanny Adawlut (present W. Cowper), the appellant was allowed to bring some additional evidence as to his exclusive title to the estate in contest; after consideration of which, and of counter-evidence adduced by the respondents, it was determined, that the appellant's plea of exclusive possession as proprietor, had been refuted; that the respondents and other descendants of Umur Sing, the common ancestor, were entitled to shares in the estate, according to the Hindoo law of inheritance. But previously to a final determination on the division of the estate, the Court caused a proclamation to be issued for the purpose of ascertaining the whole of the claimants to it; and a claim being advanced (among others) by Bhoop Sing, one of the sons of Durgahy Sing, alleging that he had been adopted by Buktawur Sing, he was allowed to bring evidence on that point; on consideration of which the Court admitted his adoption, and received the following opinion from their pundits as to the legal division of the estate among the whole of the surviving claimants, as distinguished in the prefixed genealogical sketch. At the demise of Umur Sing, his surviving sons Dunia Sing, Beer Sing, and Khoshal Sing, the two others having left no male issue, take each a third of his estate. Ajeet Sing, son of Beer Sing, receives his father's share; and Dhomun Sing, son of Khoshal Sing, the share of his father. At the demise of Dhomun Sing, his four sons, Bukshee Sing, Bhadul Sing, Mahesdutt and Bhola Sing, each get a fourth of his share. Of Dunia Sing there were three sons, Durgahy Sing, Rajoo Sing and Buktawur Sing; each of whom will take a third of his share. Duttanaraen Sing, Byjnath Sing, and Bhoop Sing, are the sons of Durgahy Sing; but as, of these, Bhoop Sing was adopted by Buktawur Sing, the two remaining brothers will divide the share of their father, each taking half. Bhoop Sing, excluded from sharing in the estate of his natural father, will take the share of his adoptive father, Buktawur; and must maintain his adoptive father's widow. Rughoobeer Sing and Chota Sing, sons of Rajoo Sing, will divide their father's share. According to the above distribution, the Court (present W. Cowper) gave final judgment; providing in it for a suitable maintenance to be afforded by Bhoop

1799.
division had been claimed.
The mere act of performing the funeral rites of a deceased Hindoo can give no title of succession, without proof of right.
An adopted son (*dattaca*) taking the estate of his adoptive father, is excluded from inheritance in his own family.

1799. Sing, to the widow of his adoptive father. And it was further decreed, that the appellant should account to the several sharers for the profits of shares, since the date of the Zillah decree.

Duttanarain
Sing, v.
Ajeet Sing,
Bukshree
Sing and
Rughoo-
beer Sing.

It should be observed, that, in this case, a question arose incidentally, as to what consequence would attach to an alleged circumstance, if proved, namely, that Durgahy Sing performed the funeral obsequies of Gumbheer Sing, one of the sons of Umur Sing, who died without issue; a ceremony which ought to be performed by the heirs of deceased persons. And the pundits stated, that this singly could not give him any title to the inheritance of the deceased; unless there were evidence to prove the fact of the deceased having made him his heir by adoption.

Another point to which the attention of the pundits was called, was how far the adoption of Bhoop Sing by his uncle, would affect his right of succession to his natural father's estate; and, as above stated, they declared that this excluded him from any share of the paternal inheritance. (a)

1799. SHIECHUND RAI, (Son of NUNDKOMAR RAI, deceased,)

Appellant,

Feb. 14th.

versus

LUBUNG DASEE, (Widow of RADHANATH RAI,) Respondent.

THIS was a suit instituted by Lubung Dasee, in the Zillah Court at Burdwan, against the late Nundkomar, to recover a balance of zemindary *moshakira* due to her as joint zemindar of '9 anas pergunnah Moolhummul Ameenpore, &c. and fixed for her by Government in the year 1779, at rupees 2,109 *per annum*; to which extent a deduction was allowed on her account at the decennial settlement of the zemindary concluded with the defendant, one of the joint proprietors, in the Bengal year 1197. The Zillah Judge considered the plaintiff's claim established by the evidence adduced by her; and the defendant having failed to produce the accounts of his actual receipts from the zemindary, which were required with a view to make an equal division of the profit and loss between the three joint proprietors, viz. the defendant, Lubung Dasee, and the widow of Govindchund Rai, a decree was passed for the plaintiff's receiving the *moshakira*, as fixed by Government in 1779; and recovering arrears of it at that rate. And the Provincial Court of Calcutta, in appeal, affirmed this decision.

(a) The principles on which the distribution of shares was adjusted will be found in the *Mitachara* (Ch. 1, on inheritance, Sec. 5, § 2.) concerning the case of brothers leaving an unequal number of sons; and (Sec. 11, § 32.) regarding the exclusion of an adopted son (*dattaca*) from the family and estate of his natural father. The claim of the appellant, grounded on the circumstance of his father having performed the obsequies, as he alleged, of an uncle who died childless, was founded on passages of Hindoo law, which intimate, that the succession to the estate, and the right of performing the obsequies, go together (*Jagan-nath's Digest*, Book 5, v. 455, and 457). But those passages do not imply that the mere act of celebrating the funeral rites gives a title to the succession; but that the successor is bound to the due performance of the last rites for the person whose wealth has devolved on him.

A further appeal was brought to the Sudder Dewanny Adawlut 1799. by the defendant, resting principally on the instrument termed a *ruffa-nameh*, or deed of compromise, bearing date in 1199, pur-
ported to have been executed by the respondent, but denied on
her part, and rejected as a fabrication by the lower Courts: in which
deed it was set forth, that by reason of deficiency in the assets
of the zemindary, she had agreed with the appellant to "relinquish
to him the difference, and to receive during her life only 741
rupees *per annum*, with a provision of 280 rupees yearly to her
grandson, Tarachund Ghose, after her death." The Sudder
Dewanny Adawlut (present W. Cowper), after taking an opinion
from the pundits relative to the validity of this *ruffa-nameh* in
point of law, supposing it established; and after receiving some
further evidence which it appeared necessary to examine as to its
authenticity, considered that this deed, which was not originally
exhibited by the appellant, nor mentioned in his answer to the
original plaint; and which was not satisfactorily proved to have
been executed by the respondent; was, in point of fact, not ad-
missible; and that the respondent's claim was established. And
the Court, affirming the judgments of the Courts below, decreed,
that the appellant should continue to pay to the respondent the
annual amount adjudged by those decrees, as her share of the pro-
fits of the joint zemindary, until he should account to her for his
actual receipts and disbursements from the joint zemindary; after
which she would be entitled to her third share of the actual pro-
fits, whatever they might be.

It is to be observed, with respect to the question put to the
pundits relative to the *ruffa-nameh*, that they were desired to con-
sider the proceedings in the case, and to state whether, supposing
it to have been duly executed by the widow of Radhanath Rai,
joint zemindar of the 9 ana estate, it would be valid in law against
her, and against the heirs of her husband; taking into their con-
sideration, that no equivalent appeared to have been allowed to
her for the relinquishment of the zemindary *moshkhira* of 2,409
rupees; that the profits of the share of the zemindary were not
shewn to have been inadequate to the payment of the full allowance
at the time it was alleged to have been executed; and that, from
the appellant's refusing to produce his accounts, and objecting
to an adjustment according to actual assets, it was rather pre-
sumable that the contrary was the case. The pundits, in their
answer, stated, that the widow, after her husband's demise, was
heir to his property; that if she voluntarily executed the *ruffa-
nameh*, it was valid against her and her husband's heirs: but that
the deed itself, in point of fact, appeared of no authority; for the
alleged reason for its execution, viz. want of assets in the zemin-
dary, did not appear to be true; and they discovered no proof to
establish its execution. (a)

(a) The opinion delivered by the pundits, purporting, that the deed of relin-
quishment, if genuine, might have been binding on the heirs of the husband and
successors of the widow, as well as on the widow herself who executed it, is
questionable; as importing that it would be binding on them beyond the period
of her life, because it was voluntarily executed by her. Being successors not
only to the zemindary held by her for her life, but to the savings accumulated
by her during her possession of it, and on the other hand, obliged to support her

1799.

AZEEMOODIN, Appellant,

versus

June 27th.

FATIMA BEEBEE, Respondent

A gift of a portion of any landed property, without distinct allotment of it, and delivery of possession to the donee, is invalid in Moohum-mudan law. THIS was an action brought by Azeemoodin, in the Zillah Court of Burdwan, against Fatima Beebee, for the sum of 205 rupees, as amount collected, in the Bengal year 1197, from a moiety of Mouza Kunkar and other land, stated to have been conveyed to the plaintiff by gift, from the defendant, under a *tumleek-nameh* bearing date in 1191; the net annual profits of which moiety, after deducting the revenue payable to Government, were 130 rupees. The Zillah Judge, considering the execution of the *tumleek-nameh* established by the evidence adduced; and being informed by his law officer, that the gift thereby made could not be cancelled, gave judgment for the plaintiff. But the Provincial Court of Calcutta, in appeal to them by the defendant on legal objections to the validity of the gift, received an opinion from their law officer, that a gift (*tumleek*) of a portion of land, without the division and delivery of possession of such land, is invalid. And as the Zillah proceedings did not exhibit proof of the division of the land, or possession of the claimant, the Provincial Court reversed the Zillah decree.

In appeal to the Sudder Dewanny Adawlut by the claimant, the law officers were called on for their opinion on the case, and were desired to state, whether the *tumleek-nameh* executed by the respondent, without delivery of possession of the land therein mentioned, was or was not, in law, binding on the respondent. Their *futwa* was this: It appears that Fatima Beebee took the estate left by her husband in satisfaction of dower, and executed a gift of half of it to Azeemoodin. This has been proved by the evidence of witnesses who attested the *tumleek-nameh*. But complete possession of the donee, an essential to the validity of *hibeh*, or gift, did not take place. This is a case of *hibeh-moshua*, or gift of undefined property; and the validity of such a gift depends on the donor's separating and distinguishing the shares, and then delivering the part given into the donee's possession. In this case, such a separation or delivery is not proved. The *Tumleek-nameh* therefore is not of any effect. It is stated in the *Hedaya*, that, if

should she become destitute, they might have pretensions to resist an improvident relinquishment by her of a part of her income: if, however, she reserved a sufficiency for her maintenance, they could not be admitted to contest at law her voluntary and deliberate acts upon this ground; any more than to recall any improvident expenditure or gift of a part of her income after it had come into her hands; the control over a woman, who is enjoined to make a frugal use of her husband's property which has devolved on her for want of male issue, not extending to this length (*Simuta Yakana*, Ch. 11, Sec. 1, § 56, and 60). But she could not by her act bind the successors to relinquishment of part of their due share of the estate, after her demise. On the other hand, if the relinquishment of a claim to a greater income than the assets of the estate would afford, were *hund fide* made on real and sufficient grounds, the transaction might be unexceptionable. But no doubt, if it proceeded on a false suggestion, it could not conclude either her or the heirs. As the deed itself was considered not to be proved, and the decision did not turn on the question of the widow's power to bind the heirs, the opinion of the law officers on that point must be taken with limitation and caution.

a man make a gift of a portion, intermixed with his property, without due specification of the particular portion given; for instance, if he say, 'I have given to such a one a half or third of such a spot of land, or such a piece of cloth,' the gift would be invalid; though if afterwards the donor should separate it off, and give possession, the gift would hold good. The declaration of Fatima mentioned in the *tumleek-numeh*, viz. "having separated it from my own property, I have made it over to the property of Azeemooddeen, and the donee has taken it into his full possession," would appear to indicate the requisite separation and partition: but this declaration is not mentioned by the witnesses. If it were proved by credible witnesses to have been made by Fatima Beebee, it would be good against her: for as to acts not repugnant to reason or probability, men are bound by their own declarations. Without proof of this circumstance, the *Tumleek-nameh* singly would not avail.

1799.

Azeemood-
din, v. Fa-
timaBeebee

After receiving this *Futwa*, the Court allowed the appellant to bring witnesses to the above declaration having been made by the respondent; whose depositions having been delivered to the law officers, they returned the following opinion: To constitute a complete gift, it is necessary that the subject given be separated, and that complete possession take place; and this is not proved by the testimony of the present witnesses; and the stated declaration of the widow, that 'having taken it out from her own property, she placed it in complete possession of the donee,' is not proved by these witnesses.

The Sudder Dewanny Adawlut (present W. Cowper), affirmed the decree of the Provincial Court. (a)

KISHIWUR KHAN, Appellant,
versus
JEWUN KHAN, Respondent.

1799.

August 9th.

THE parties in this case were sons of Motee Khan, who died in the Bengal year 1191. The suit, which was instituted by Jewun Khan in the Dewanny Adawlut at Jessore, was for a division of the property real and personal, of their father, specified under 27 heads. The Zillah Judge made a decree for the plaintiff, containing a specific division of the property between the parties.

In appeal to the Sudder Dewanny Adawlut, it having appeared that these were not the only heirs, the proclamation required by section 13, regulation 3, 1793, was issued, desiring all those to come forward, within a limited time, who might have claims to share in the estate of Motee Khan. The following was the decree passed by the Court (present W. Cowper): The appellant has failed in proving, that he and the respondent received from their father Motee Khan their respective shares of his estate, and were put into possession thereof previously to their father's death: which plea not having been established, and Motee Khan having died

An en-
gagement
by A, an
heir of a
deceased
Moohum-
mudan, to
B, reciting,
tha. B shall
sue for her
share of an
estate then
under liti-
gation, and
that the
same shall
become the
property of
B, B sup-
porting A
for life, is
not, in

(a) See *Hedaya*, (Book 30, Ch. 1, Vol. 3, p. 295.)

1799. — Moohummudan law, valid as a conveyance of property. A verbal bequest of property, real or personal, is valid in Moohummudan law, as far as a third of the property of the bequeather; two thirds falling necessarily to the heirs at law.

intestate, his estate was divisible among his heirs at law; who appear to have been his two sons, the appellant and respondent; and his wife Mussumnaut Neelee: exclusive of his daughter married to Syud Khan, who acknowledges, that she received a provision from her father, and in consequence relinquished her title to succeed to any part of his estate. The respondent, Jewun Khan, has set up a claim to the share of Neelee, under an *ikrar-nameh*, said to have been executed by her in his favour; but as this deed has been declared by the law officers, both from the tenor of it, and from possession not having been received under it, to be legally invalid, the Court have not deemed it necessary to call upon the respondent to establish its authenticity. The respondent's daughter, Sheruf-on-nisa, has also preferred a claim to the share of Neelee, on the ground of a verbal bequest alleged to have been made to her: which, had it been established, would, according to the opinion of the law officers, have entitled her, after the discharge of Neelee's debts, to a third part of her remaining share of the property of Motee Khan: but Sheruf-on-nisa, when called upon, having failed to adduce such evidence, her claim cannot be admitted. A proclamation has been issued, requiring any persons who might have claim to Neelee's share of the late Motee Khan's estate, to come forward and claim the same; but no one has come forward. The Court, therefore, reserving the right of any future claimants to Neelee's share of Motee Khan's estate, who may shew sufficient reason for not having brought forward their claims in consequence of the proclamation above noticed, adjudge the estate of the late Motee Khan to his sons, the appellant and respondent: and confirm the decree of the Zillah Judge, and the division made by him of the estate, which is declared by the officers, with a few inconsiderable exceptions, which the Court considered immaterial, to be conformable to the Moohummudan law.

The *ikrar-nameh* noticed in the judgment of the Sudder Dewanny Adawlut, said to have been executed by Neelee in favour of Jewun Khan the respondent, under date the 31st *Cheit* 1199, was to this effect: "I am the widow of Motee Khan. Whereas, in a suit between his two sons, the defendant appealed to the Sudder Dewanny Adawlut, where he asserted that I was not the wife of Motee Khan, and the Zillah Judge was directed to enquire into the fact, and ascertain whether I had any claim of inheritance; I hereby authorize Jewun Khan to prove the fact and right. Whatever share I may be found entitled to, I will assign to Jewun Khan. He becoming proprietor of the same, shall maintain me for life. I will not recede from this my formal engagement."

To questions referred by the Court to their law officers, as to what would be the effect of this *ikrar-nameh*, and of the verbal bequest in favour of Sheruf-on-nisa, supposing each to be duly proved, the following were the answers given:

An *ikrar-nameh* of the nature of that which Neelee has executed in favour of Jewun Khan, does not, in law, serve to prove a gift, or to render it valid: because, to render a gift valid, it is necessary that the property given be divided off from the shares of coparceners, and that complete possession be given; whereas, at

the time this deed was executed, Neelee's share was not separated from the shares of the other heirs of Motee Khan; nor was possession, which is one of its essentials, obtained. Besides, in the *ikrar-nameh*, Neelee uses the future tense; whereas, to give effect to contracts, among which gifts are numbered, the past tense is requisite. Jewun Khan's claim to the property of Motee Khan, in virtue of the gift stated in this *ikrar-nameh*, will not avail in law. As to the claim preferred by Sheruf-on-nisa, in virtue of the bequest by credible witnesses, she will be entitled (after the discharge of Neelee's debts) to the third of Neelee's portion of Motee Khan's property: the remaining two thirds falling, by law, to the legal heirs of Neelee. Should she not be able to substantiate the bequest, the whole of Neelee's share will go to her heirs. (a)

1799.
Kishwur
Khan, v.
Jewun
Khan.

BHYROOCHUND RAI, Appellant,

versus

RUSSOOMUNEE, Respondent.

1799.

Sept. 18th.

RUSSOOMUNEE was the widow of Ramchund Rai, who with his three brothers, Bhyroochund, Tilokchund, and Hurchund, had succeeded jointly at the demise of their father, to the zemindary right of "Kismut 17 g. 2 c. pergunnah Selimabad." This suit was brought by Russoomunee against her husband's brothers, for his share of the zemindary, which was alleged to be one-sixteenth by (*Jet,huns*) right of *primogeniture*, and a fourth of the remainder. Of the defendants, the first denied the widow's claim to any share at all; the two others admitted her claim as far as it might be conformable to law. The pundit of the Zillah Court gave an opinion, that the widow was entitled, as her husband's representative, to share equally with the husband's brothers the estate left by their father, but not to any larger portion by right of *primogeniture*. The Zillah Judge accordingly decreed that the estate should be divided equally, and the plaintiff receive four-sixteenths.

At the partition of a landed estate among the sons of a deceased Hindoo, all shall share equally. The eldest has no claim to a greater share than the rest on the ground of *primogeniture*.

Bhyroochund appealed to the Provincial Court of Dacca, the pundit of which Court, in answer to a question relative to the partition among sons, declared, that by the *Shaster*, the first born, in consideration of abilities and erudition, was entitled to one twentieth above the share of the rest; but that, in the *Caliyug*, or present age, since elder brothers of the requisite qualifications were not met with, and elder brothers were not much revered by younger brothers, the operation of that part of the *Shaster* had ceased, and an elder brother was not entitled to the twentieth share

(a) The principles of Moohummudan law on which the law opinion and decision in this case rest, will be found in the *Hedaya* (Book 30, Ch. 1, Vol. 3, p. 293) concerning a gift of an undivided portion; and in the *Hedaya* (Book 52, Ch. 1, Vol. 4, p. 462) and *Sirajiyah*, p. 1, for the limitation of legacies to a third of the property; and in the *Sirajiyah*, p. 4, to 10, regarding the succession of a widow and sons.

The notion that a transfer of property by words declaring it future is not good in law, occurs in the *Hedaya*, Vol. 4, p. 467.

1799. additional: that an elder brother's obtaining a greater share, at partition, than the younger ones, depended on their consent. The Court of Appeal, on this, affirmed the Zillah decree.
- Bhyroo-
chunder
Rai, v.
Russoom-
nee. And the Sudder Dewanny Adawlut (present P. Speke and W. Cowper) after taking an opinion from their pundits, corresponding with the above, affirmed the decree of the Provincial Court. (a)

1799.
Nov. 20th.

MOHUN SING, Appellant,
versus
CHUMUN RAI, Respondent.

By the Hin-
doo law, a
son not
born in law-
ful wedlock
may in-
herit, if
such be the
custom of
the pro-
vince, but
not other-
wise. In
this case, it
appearing
that by the
custom of
Nagur
Brahmins
in Benares,
illegitimate
sons cannot
inherit,
judgment
passed a-
gainst the
claimant,
the illegi-
timate son
of a *Nu-
gur* Brah-
min, suing
for his fa-
ther's es-
tate.

THIS suit was instituted by Mohun Sing in the former Civil Court of the city of Benares, in 1794, to recover the estate of Jeswunt Rai and Bhagwunt Rai, the one the father, and the other the half-brother of the plaintiff, who declared himself to be the illegitimate son of Jeswunt Rai, a *Nagur* Brahmin, by a Brahminee woman of a different race. The estate was estimated at 20,000 rupees, clear of debts and incumbrances. It appeared in evidence that Jeswunt Rai had left only one legitimate son, Bhagwunt Rai, who died without issue, and that, during Bhagwunt Rai's life-time, a division of property had taken place between him and the father of the defendant; which defendant was the great grandson of Buswunt Rai, brother of Jeswunt Rai.

The cause having been transferred, before decision, to the present City Court at Benares, a decree was there passed for the plaintiff, on the ground of a *vyavastha* from the pundit, importing that an illegitimate son might inherit.

The Provincial Court of Benares, in appeal, reversed this decree, in consequence of an opinion of their pundit against the claimant, and decreed that the defendant should retain the property, making the plaintiff a monthly allowance for subsistence.

In appeal by the plaintiff to the Sudder Dewanny Adawlut, the Court applied to their pundits, to determine the law of the case: and, from the opinion given by them, as well as from a reference to the Digest of Hindoo Law, it appeared to the Court, that an illegitimate son is entitled to succeed to the estate of his father, as well as to the estate of his legitimate half brother, provided such succession is sanctioned by established local usage, but not otherwise; the former laws in favour of illegitimate children and other descriptions of sons (twelve in number) specified by the pundits (with the exception of the *Ourus-pootr*, or son born in wedlock,

(a) The admission of the widow to share an undivided estate with the brethren of her husband, and to require from them a partition of it, although her allotment will devolve on the heirs of her husband after her decease, is according to the Hindoo law, as received in the province of Bengal. (*Jimuta Vahana*, Ch. 11, Sec. 1). It is otherwise in the rest of the provinces, where a different exposition of the law is followed.

The allotment of a superior portion to the elder brother, in token of reverence, is obsolete (*Jimuta Vahana*, Ch. 3, Sect. 2, § 26 and 27) unless by the free consent of the younger brothers; and the widow's pretensions to it were preposterous, no such allotment having been assigned to her husband in his life-time.

and *Duttuk-pootr*, or son by adoption) being generally considered 1799.
to have been abrogated or become obsolete in the *Caliyug*, or present age, unless by the established usage of any particular country or province, the right of succession may have been preserved to illegitimate children, as well as to those born in wedlock, or adopted; in which case such usage is to be adhered to.

Mohun
Sing, v.
Chumma
Rai.

The appellant was in consequence required to prove his right of succession to the estate in contest, by the established usage of the province of Benares: and under instructions from the Court, evidence was taken on the point, and transmitted by the Judge of Benares. This evidence proved, that by the custom of Brahmins of the *Nagur* cast in that province, illegitimate sons are not entitled to inherit. The Sudder Dewanny Adawlut (present P. Speke and W. Cowper) accordingly affirmed the decree of the Provincial Court, and dismissed the appeal. (a)

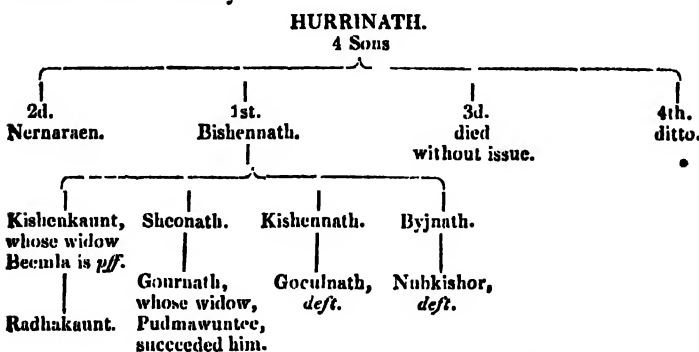
BEEMLA DIBEH, Appellant,
versus
GOCULNATH and NUBKISHOR, Respondents.

1800.

Jan. 2nd.

THIS suit was brought by Beemla Dibeh (on the part of her son) in the Zillah Court of Rungpore, against Goculnath and Nubkishor, to recover a half share of an estate consisting of pergunnahs Idrakpore and Beriperee, the annual revenue of which half was rupees 79,670, alleging that the right to it had devolved to her late husband Kishenkaunt Rai, from his grandfather Hurinath; and from him (Kishenkaunt) to his son Radhakaunt. The following is a sketch of the family:

A zemindary had gone to the eldest sons of a Hindoo family, successively, but after the great-grandson, male issue failing, it went to his widow; on whose death the defendants, two cousins german of her husband, took possession. At the suit of a descendant of the second son of the great-grandfather, held



(a) The claimant was considered to be of that class of illegitimate offspring, that at the which is denominated *Paunerbhava*. (See *Mitacshara*, Ch. 1, Sec. 11, § 8.) And, by the ancient law, such offspring was entitled to the inheritance on failure of the great- of legitimate or other preferable issue, or to an inferior portion if there were a grandson's legitimate son. (*Ibid*, § 22 and 24). But that part of the law is in general con- sidered obsolete; and among the *Nagur* Brahmins in particular, as was ascer- tained by evidence to their national usage.

demise of
the great-
widow, the
cousins
as

1800.

his nearest
relations,
had the
right to
succeed.

The defendants denied the justice of the claim, affirming, that the estate was the sole right of Bishennath, as being the eldest son, from whom it descended to Sheonath and Gournath, and, after the death of the latter, to his widow Pudmawutee; that they now were entitled to it by inheritance, as well as by gift from Pudmawutee. The Zillah Judge, after taking an opinion from his pundit, gave judgment for the moiety claimed, as being Radhakaunt's hereditary share of the 'joint zemindary;' which judgment the Provincial Court reversed, considering, according to an opinion of the pundit, that on the demise of Pudmawutee, widow of Gournath, the whole zemindary went by law to the defendants, as cousins of Gournath.

In appeal by the plaintiff from this decision to the Sudder Dewanny Adawlut, it was contended by the appellant, that the elder branch of the family of Bishennath having failed, the family of his 2nd and 3d sons should not be preferred to the family of his younger brother, Nernaraen. The Court stated the case thus for the opinion of their pundits: A zemindary belonging to a Hindoo family has, by the family usage, through several generations for above one hundred years, descended to the eldest son, while the other sons have received a provision for their maintenance. Rajah Hurrinath, a former proprietor of the zemindary under the above usage, had four sons; the eldest Bishennath, who succeeded to the zemindary; the second Nernaraen, who received a provision for his maintenance, and had issue: the third and fourth sons died without issue. Bishennath had three sons; the eldest Sheonath, who succeeded to the zemindary; the second Kishennath; the third Byjnath had two sons; Gournath, who succeeded to the zemindary; and Kishennath, who died young without issue. Gournath also died without issue: and his widow Pudmawutee succeeded to the zemindary. Nernaraen abovementioned had one son, Kishenkaunt; who also had a son, Radhakaunt, now living with his mother Beemla Dibeh, the widow of Kishennath abovementioned had one son, Goculnath, who is now living. Byjnath, the third son of Bishennath, had two sons, of whom the eldest is Nubkishor, now living. In such case, on the death of Pudmawutee, who, according to the Hindoo law, was entitled to succeed to the zemindary? And 2ndly, if Radhakaunt, in the case above stated, be entitled to any part of the zemindary, is such title done away by Pudmawutee's having admitted Goculnath and Nubkishor to be joint proprietors of the zemindary with her, during her life? The pundits answered, 1st, that Goculnath and Nubkishor, being the nearest *Sapindas* or relations, where heirs, after the death of Pudmawutee, to the property which had devolved on her: 2nd, that if Beemla and Radhakaunt made no opposition when Pudmawutee agreed that Goculnath and Nubkishor should share the zemindary, Radhakaunt's right to a share would be thereby lost to him: (for "if the owner does not offer opposition when his own property is given away by his coheirs or by strangers, it is pronounced to be his own gift.") But if he offered any opposition, he would be a sharer, notwithstanding Pudmawutee's admission of Goculnath and Nubkishor. For "partition among coheirs extends to the fourth degree." By the answer of the pundits to the first part of

this case, it appearing, that on the death of Pudmawutee, the right of succession vested by the Hindoo law in the respondents, as being her husband's nearest relations; the Court (present W. Cowper) determined that the claim of the appellant was not maintainable, and affirmed the decree of the Provincial Court; specifying, however, at the same time, that this decision was not to affect any claim which the appellant might have to receive a maintenance from the respondents. (a)

1800.

Beemla
Dibeh, v.
Goculnath
and Nub-
kishor.

NEWAZEE FERAUSH, Appellant,

1800.

versus

MUSSUMMAUT ATLUSSEE, and IBRAHIM SERANG,
Respondents.

Nov. 26th.

IN the Bengal year 1194, Waris Khansaman married his son A deed of Huneef, then seven years of age, to Lalun, daughter of Newazee gift by a father to his minor son, Feraush, then eighteen months old; and, shortly before the ceremony, executed a *hibeh-nameh*, or deed of gift, to the following for proper effect, under date the 15th *Phagun* of the above year: "I Waris Khansaman write this deed of gift: my son Sheikh Huneef has married Lalun, daughter of Newazee Feraush, for a dower of 950 possession was not delivered at the time of 101 rup-es; besides ornaments to the value of 100 rup-es; and 101 rup-es on account of his mother's dower; and other ornaments, the gift or 100 rup-es; the whole value being 1,251 rup-es: besides which, during the father's life (about four years beyond the date of it), I my house, land, copper utensils, papers, chest, gun, sword, ready cash, bonds, &c. to the amount of 3,815 rup-es; total value 5,066 rup-es; I have given in right of my said son, of my own free will. held valid in Moon- I or my heirs have henceforth no claim thereto." It does not appear that the property specified in this gift was delivered, either to the son or daughter-in-law. In 1197, Waris Khansaman married hummudan Atlussee, whose husband, Ibrahim Serang, had been long absent at sea, and was supposed to be dead; and by a deed of gift in lieu of the son being a minor, dower, made over to her his garden house and certain other property. Waris soon afterwards died; and Huneef his son died presumed that the father was trustee for him. also. Atlussee and her husband, who afterwards made his appearance, were stated to be in possession of all the property he (Waris) had possessed. This suit was therefore brought by (One fourth Newazee Feraush, in behalf of his daughter, in the Zillah Court, of the property conveyed by the gift, ad- in April 1794, or *Cheit* of the Bengal year 1200, against Atlussee

(a) The estate having passed through three generations of the eldest branch, judged to and remained in that branch during a period of more than a hundred years, was the son's considered to be a separate estate in the hands of the widow of the last possessor as her heir; in the family as coheirs. On failure of the elder branch, the estate would regu- addition to larly pass, after the death of the widow of the last possessor, to the heirs of her husband: and those were his uncle's sons, in preference to the grandsons of A gift in his great uncle. (*Jimuta Vahana*, Ch. 11, Sect. 6, § 9, and recapitulation by Sri lien of dow- Krishna, inserted at the close of that section.) Had the appellant's son been or is not entitled to share in the succession, his title could not have been defeated by the validated act of the widow admitting the respondents to a participation in the zemindary by the war- without his consent.

1800. and Ibrahim Serang, to recover the property specified in the first deed of gift, as having been settled by that gift on his son Huneef, and his daughter-in-law Lalun; and taken charge of by him on their part. Judgment went against the plaintiff in the Zillah Court; and also in the Provincial Court of Appeal, on a law opinion against the validity of the first deed of gift.

riage, on occasion of which the dower was settled, proving illegal, by the return of the wife's former husband, supposed to have been dead.

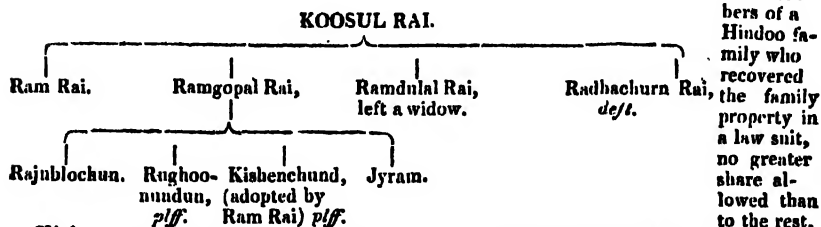
In further appeal to the Sudder Dewanny Adawlut (present P. Speke), the proceedings were submitted to the law officers; who, after considering them, gave the following opinion: Although the deed of gift by Waris Khansaman is not in the proper form in which such instruments should be executed, yet from the translation of the original (in the Bengal language) it appears, that Waris Khansaman, for the purpose of rendering his son Huneef independent, and of giving satisfaction by that means to the relations of Lalun Beebee, his son's wife, made over by gift to his son, in money, 950 rupees, on account of the dower of Lalun, daughter of Newazee; 100 rupees on account of ornaments; 201 rupees for money and ornaments settled on the mother of Huneef; and other sums and property, as detailed at the foot of the deed of gift. For the terms of the deed are, "I have given these things in the right of my son." Though the intended donee is not distinctly stated, the evident meaning of the terms is, "in lieu of the right my son has on me, I have given these things to him." And Lalun Beebee is not the donee. A gift made by a father to a son not of age, although possession of the subject given be not delivered to the son, is valid, in consideration of the power which a father may exercise on the part of a son; especially when the father gives himself out as trustee on the part of his son. The declaration of the witnesses, that the writing was executed prior to the *nekah*, or ceremony of marriage between Huneef and Lalun, does not invalidate the gift. The settlement of Lalun might have been fixed during the forms preparatory to the marriage, and before the ceremony took place. The gift in question therefore is valid. In like manner, the gift made by Waris Khansaman to Atlussee, although in lieu of dower settled on her in a void contract of marriage, is valid; provided the things so given by this second gift are distinct from those conveyed by the first. Lalun therefore has a claim for the amount of her dower; and for a fourth share of the property conveyed by gift to her husband Huneef. Under this opinion, the Sudder Dewanny Adawlut determined that the estate of the deceased Waris Khansaman should be deemed responsible, 1st, for 950 rupees, the amount of the dower of Lalun, to be paid to her father the appellant: 2nd, for 1,029 rupees, a fourth of the value of the lands, jewels, &c. made over to Huneef by the gift in his favour; to be paid to the appellant on account of his daughter, as the widow's legal share of the husband's property: 3d, for a garden house, appurtenances, and effects, made over by Waris Khansaman to Atlussee by the deed of gift of 1197, to which she was entitled, provided the estate of Waris Khansaman were sufficient to admit of her taking the same, after payment of the amount due to Lalun Beebee: 4th, if, after satisfying the above adjudged claims, any part of the estate of the deceased Waris Khansaman should remain inappropriate, it was

declared to be the right of the heirs at law. The Court accordingly, 1800.
 setting aside the decrees of the lower courts, adjudged, that the
 respondents should be held accountable to the appellant for the
 sum of 1,979 rupees, if the latter should make it appear that the
 respondents had obtained possession of property to that amount, <sup>Newazee Feraush, v. Mussum-
 pertaining to the late Waris Khansaman; or if not, to what lussee, and Ibrahim Serang.</sup>
 ever part of his property they should have possessed themselves
 of since or before his death. (a)

RADHACHURN RAI, Appellant,
versus
 KISHENCHUND RAI, and RUGHOONUNDUN RAI,
 Respondents.

1801.
 Feb. 25th.

THE family of the parties in this case, was as follows:—



To one of the members of a Hindoo family who recovered the family property in a law suit, no greater share allowed than to the rest,

Kishenchund and Rughoonundun brought the action against Radhachurn, in the Zillah Court of the 24 pergunnahs, for two-thirds of a 2 ana, 13 gunda, 1 cownie division of pergunnahs Magoora, &c. the annual *jumma* of which division was stated at 8,506 rupees. The plaintiffs claimed this portion as their right of inheritance, setting forth in their plaint, that by a decree of the Calcutta Committee of Revenue, passed in August 1778, and affirmed in appeal by the Sudder Dewanny Adawlut, the whole estate was divided into six equal portions, one of which (2a. 13g. 1c.) was adjudged to the defendant, as the representative of his father Koosul Rai; and of this portion the plaintiffs claimed the part specified. The defendant objected, on grounds detailed in his answer, that he was entitled to a greater share than the other heirs of the portion of Koosul Rai. A decree was passed by the Zillah Judge, declaring, that the lands of Koosul Rai descended in equal portions to his four sons; that the plaintiff Kishenchund was entitled to the share of Ram Rai, who adopted him; that the defendant, Rughoonundun, and his two remaining brothers, were entitled to the share of their deceased father Ramgopal; that the share of Ramdulal Rai should be divided off; and that one-fourth should be allotted to the defendant, as belonging to him in his own right.

at the division; but under special circumstances. The widow of a Hindoo dying without issue, takes his estate. Parol evidence that she relinquished her title to it, not received by the Sudder Dewanny Adawlut.

(a) The maxims of Moohummudan law on which the law opinion in this case, and consequent decree, are founded, may be consulted in the *Hedaya* (Book 30, Ch. 1, Vol. 3, p. 296; and Book 2d, Ch. 3, Vol. 1, p. 146); and in regard to the wife's fourth of her husband's property, in the *Sirajiyah*, p. 4.

1801. The Calcutta Provincial Court affirmed this decree in appeal; and the defendant further appealed to the Sudder Dewanny Adawlut; insisting, chiefly, 1st, that as the estate was recovered to the family by his exertions, he was entitled to a larger portion of it than the respondents; 2nd, that the widow of Ramdulal (who had come forward with a claim under Section 13, Regulation 3, 1793) had no right to more than a maintenance; and that, if she ever had any such right, she, as the appellant could prove by witnesses, had relinquished it. In passing judgment on the case, the Court remarked, that the claim of the appellant to hold a larger share of the family estate than his brothers, on the ground of his having undertaken the trouble and expence of recovering it from the usurpation of Suntose Rai (by a suit in which judgment was obtained in 1778) could not now be supported; for that, were it founded in justice, it would have been brought forward by him when the cause, determined in 1778, was depending; as it would have entitled him, on the principle now insisted on, to a larger portion of the whole zemindary than the other claimants; whereas, by that decree, on which the rights of both parties in this case were grounded, the zemindary was divided into six equal portions. With respect to the right of the widow, the Court put a question to their pundits; by whose answer, as well as by a reference to the Digest of Hindoo Law, it appeared, that she was entitled to the whole estate of her deceased husband; and the Court considered that the assertion of the appellant, that the widow verbally relinquished her right, was not entitled to any weight, inasmuch as the admission of oral testimony in cases of this nature would open a door to much fraud and injustice. The Sudder Dewanny Adawlut (present P. Speke) therefore affirmed the Zillah decree, further directing, that the widow should be put into possession of her husband's fourth share of the portion of Kosul Rai. (a)

Radha-
churn Rai,
v. Kishen-
chund Rai,
and Ru-
ghoonun-
dun Rai.

(a) The widow's right to her husband's share for her life, although the family be undivided, is according to the expositions of the law received in the province of Bengal. (*Jimuta Vahana*, Ch. 11, Sec. 1, § 43 and 46.)

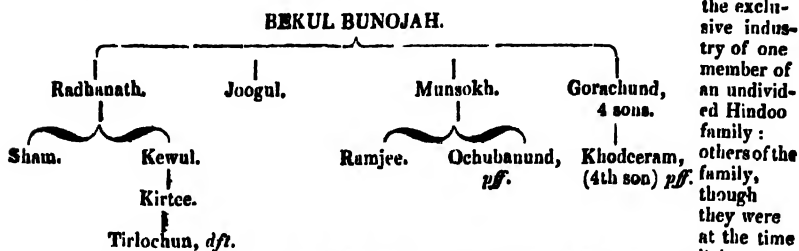
The rejection of the appellant's claim to a remuneration, which would consist in the allotment of a superior portion for his exertions in the recovery of the patrimony, was founded on special circumstances in the case, and did not proceed on the legal inadmissibility of that claim, the Hindoo law sanctioning the allotment of an additional portion in such cases, viz. one quarter to the heir who retrieves the common property. (*Jimuta Vahana*, Ch. 6, Sec. 2, § 39.)

KHODEERAM SERMA and OCHUBANAND SERMA,
Appellants,
versus
TIRLOCHUN, (a minor, through his guardian GOOROOPERSHAD),
Respondent.

180t.

Sept. 4th.

THIS was an action brought in the Civil Court of Zillah Moor- If property shedabad in May 1794, or *Bysakh* of the *Fusslee* year 1201, in be acquired which Khodeeram and Ochubanund were plaintiffs, and Tirlochun from joint defendant. The following is a sketch of the family of the parties:— funds, by the exclusive industry of one member of an undivided Hindoo family: others of the family, though they were at the time living conjointly with him, and still do so, have no title to share in his acquisition. The mere circumstance of messing conjointly is in law no conclusive proof of coparcenary in property.



The claim by the plaintiffs against the defendant was for two-thirds of the following property, viz. *kismut* pergunnah Kool bereah, assessed at 3,937 rupees; some *Burhmotur* land, producing 10 rupees *per annum*: and a brick dwelling-house, valued at 3,000 rupees. They claimed on the ground that this was a joint estate, acquired with joint funds by their uncle's son Kewul Bunojah, grandfather of the defendant, while living in family partnership with their fathers, Munsokh and Gorachund. Judgment was given for the plaintiffs in the Zillah Court, for two-thirds of a moiety of the estate; but it was reversed in appeal by the Provincial Court of Moorshedabad, whose decree recites (among other things,) that the zemindary was purchased by Kewul Bunojah, with the earnings of his own industry, when not in family partnership with the family of the plaintiffs.

An appeal against the above decision was brought to the Sudder Dewanny Adawlut by the plaintiffs, on various objections of fact and law. The facts of the case appeared to the Court, from the evidence brought forward, to be these: The zemindaree claimed by the appellants, was purchased by Kewul Bunojah, grandfather of Tirlochun, the respondent; and, at the time of the purchase, Munsokh and Gorachund, fathers of the appellants, messed and lived with their nephew, the abovementioned Kewul Bunojah. And Bekul Bunojah, the father of Munsokh and Gorachund, and grandfather of Kewul Bunojah, was then alive, and also messed and lived with them. But that the zemindaree was purchased with hereditary funds, or with funds acquired in part by Munsokh or Gorachund, was not proved or presumable. On the contrary, the evidence in the case shewed, that Kewul Bunojah, while in the service of one Kishwur Khan, as *dewan*, purchased the zemindaree, in the name of his son Kirtee Bunojah, with money acquired by himself in that service; and held possession for nearly 30 years. After his death, in the Bengal year 1192, his son Kirtee Bunojah possessed the

1801. *Khodeeram Serma and Ochubannund Serma, v. Tirlochun.* estate for 8 years: and died in 1200. Tirlochun, Kirtee Bunajah's minor son, then had possession of the estate; against whom, in the beginning of 1201, the appellants set up their claim for shares; after which, about the end of 1201, in a suit previously brought by Udpooroomunee, step-mother of the respondent, a decree was given in her favour in the Zillah Court, for half the zemindaree, under a deed of gift in her favour from her deceased husband Kirtee Bunajah. As to the house, it appeared that Kewul Bunajah, after purchasing the zemindaree, pulled down a thatched dwelling, and built this in its stead; and continued in possession of it: during which period Bekul Bunajah, his grandfather, and Muusokh and Gorachund, fathers of the appellants, messed with him. After his death, his son Kirtee Bunajah possessed it; and the son separated from the appellants. With the exception of having messed conjointly, and received money from the proceeds of the zemindary on particular occasions, such as marriage or funeral solemnities, there was no trace of any thing like partnership in the zemindaree, on the part of the appellants, or their fathers. These then being the facts, the pundits were called on to answer the following questions; 1st, whether, by reason of the father of the appellants having messed conjointly with the grandfather of the respondent, at the time he purchased the zemindaree, and built the house, but without paying any part of the cost, and without there being any joint hereditary funds, the appellants had any claim in law to share in the estate, or house? 2nd, supposing them to have a claim, what would be the share of each? and whether, after the lapse of 38 years, during which the respondent's grandfather and father had been in possession, a claim on the part of the appellants, for separate shares, was maintainable?—The answers returned were; 1st, if Kewul Bunajah purchased the zemindaree singly, with the produce of his separate industry, and without any aid from funds ancestral or paternal, such zemindaree is property exclusively his, in which no other can have a right to participate. And if he obtained a *Burhmotur sunnud* for lands in his own name (which it appears he did), no one else can participate in these. And, supposing him to have built a brick house on ancestral land, with separate funds of his own, even in that case, such house would not be a property in which shares might be claimed by any coparceners he might have: coparceners in the land would only have a claim on him for other similar land, equal to their respective shares. Such is the custom, or unwritten law. From the mere circumstance of messing conjointly, co-partnership in property does not follow. 2nd, had the appellants been originally entitled to shares, they could have taken them after 38 years. Under this opinion of their pundits, the Sudder Dewanny Adawlut (present J. Lumsden and J. H. Harington) determined that the claim of the appellants was not maintainable, and affirmed the decree of the Provincial Court. (a)

(a) It is true, as the law officers of the Court declared, that the mere circumstance of living together is not conclusive evidence of partnership, though it be one among the arguments and presumptive proofs to which recourse is had, in a case of uncertainty, to determine whether a family be united or separate in regard to acquisition and property. (*Jinuta Vahana*, Ch. 14.) In the present

BISHENPIREA MUNEE, Appellant,

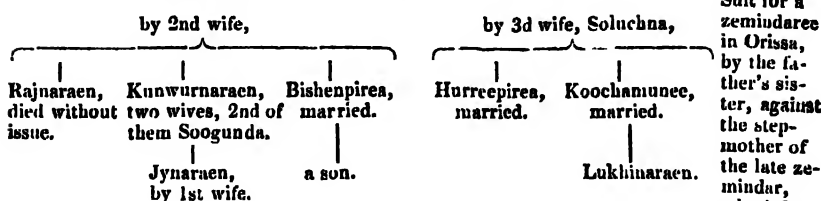
1801.

versus

RANEE SOOGUNDA, Respondent.

Sept. 25th.

RAJAH Jadooram had three wives,



Suit for a zemindaree in Orissa, by the father's sister, against the step-mother of the late zemindar, who left no issue, having died unmarried.

ON the 1st of June 1795, Bishenpirea sued Soogunda, in the Zillah Court of Midnapore, for the zemindaree of pergunnah Duroodumna, &c. of which the annual revenue was stated at rupees 87,942. The plaintiff sued on the ground, that the zemindaree of her father Jadooram Rai, had descended to his son Kunwurnaraen, and afterwards to his grandson Jynaraen; on whose demise, without issue, she, the plaintiff, was entitled to the succession, as sister of the last male possessor's father. The defendant, step-mother of Jynaraen, insisted on her own title as heir; and that the plaintiff had none. From documents produced in the case, it appeared, that the defendant had been placed in possession of the zemindaree at the death of Jynaraen in the *Willaity* year 1193, under *purwannas* from the collector of the district; and had since held it. The Zillah Judge put the case to his pundit, and to those of adjoining zillahs, stating the persons surviving at the death of Jynaraen, viz. the defendant, step-mother; the plaintiff, daughter of the grandfather; with certain others; and specifying at the same time, that the Government had put the defendant into possession of the zemindaree, at the decease of Jynaraen; and requiring them to declare who was entitled to it. It appeared according to their answers, that at the death of Jynaraen without issue, the zemindaree was the right of neither party by inheritance, but was at the disposal of the Government; that the Government having conferred it on the defendant, she had the title. Accordingly the Zillah Judge dismissed the suit; and the Provincial Court of Calcutta, in appeal, affirmed the dismissal.

At his death, there were living, besides the plaintiff and defendant, a third wife of the grandfather; with her two daughters, half-sisters of the father. One of these afterwards was married, and produced a son; and the plaintiff also produced a son, during the suit. The Sudder Dewanny Adawlut, under an opinion given by their pundits, that, at the zemindar's death, the estate vested in the defendant as heir; and having

A further appeal was brought to the Sudder Dewanny Adawlut, the appellant, who, since the suit commenced, had produced a son, giving up the claim in her own behalf, and claiming in behalf of her son, the time and mode of the acquisition of the zemindaree and *Burhmoter* lands being known, there was no room for doubt in regard to the separate property of the lands in dispute; as they were gained by the unassisted exertions of one of the family; who could not therefore, nor his descendant, be required to give up the acquisition to be shared by the rest of the family. (*Jimuta Vahana*, Ch. 6, Sec. 1, § 3.)

The right of retaining the separate possession of a house, built on ground which was common property, is countenanced by a passage of *Jimuta Vahana*, Ch. 5, Sec. 2, § 30. But the principle extends further than it is there stated.

1801. of her son; and insisting, that the appointment of Government was of no effect, and that the case must be determined according to the Hindoo laws of inheritance: in which the Court agreed, being of opinion, from the *purwannis* and other official documents in favour of the respondent, that she had been put into possession of the zemindaree after the demise of Jynaraen, as the supposed rightful successor; but that this could not be conclusive as to her title, if it were not good in law.

once vested, could not be deviated by the subsequent birth of male issue to other female relatives; but *Quere.*

The facts of the case appeared to the Court to be, that Rajah Jadooram, former zemindar of the estate, had three wives, the first of whom died without issue; the second bore two sons, viz. Kunwurnaraen and Rajnaraen: and one daughter, Bishenpirea, the appellant. The second son, Rajnaraen, died without issue: the elder, Kunwurnaraen, succeeded to the zemindaree. He had two wives, the first of whom died, after producing a son, Jynaraen, who succeeded to the zemindaree on his father's death: and after holding possession about two years, died, a minor and unmarried, in *Asin* of the *Willaity* year 1193. At the death of Jynaraen, his surviving relatives were, 1st, a step-mother (Soogunda the respondent, second wife of Kunwurnaraen); 2nd, a paternal aunt (Bishenpirea the appellant, sister of Kunwurnaraen,) married in her father's life-time, to Govindram; 3rd, a step-mother of the father (viz. Soluchna, third wife of Jadooram the grandfather,) with her two daughters, Hurreepirea, wife of Brijlal; and Koochamunee, then unmarried. At Jynaraen's death, without issue, in the year above-mentioned, Soogunda (the respondent) as widow of the father, had claimed the zemindaree and got possession; and held it till the period of this suit. Soluchna, third wife of Jadooram, had, as such, claimed the zemindaree, but died in 1194, without any thing having been decided relative to her claim. And her second daughter, Koochamunee, had, since the death of Jynaraen, been married, and produced a son, Lukhinaraen, now alive; and Bishenpirea, the appellant, after instituting the present suit, had in 1202 produced a son. Therefore, of the relatives of Jynaraen, there were at his decease, 1st, a step-mother, Soogunda; 2nd, a paternal aunt, Bishenpirea; 3rd, a step-mother of the father, Soluchna, with her two daughters; and, since Jynaraen's decease, there had been born, 4th Lukhinaraen, a son of Koochamunee; 5th, A son of Bishenpirea, or cousin-german of Jynaraen. The pundits were called on to declare, after considering the case stated, 1st, to which of the surviving relatives the hereditary zemindaree would devolve, at the decease of Jynaraen without issue: 2nd, supposing the zemindaree, at the demise of Jynaraen, to have devolved to the respondent (or step-mother,) whether, by the subsequent birth of the appellant's son, and of the son of Koochamunee, (unmarried at Jynaraen's death,) the step-mother's title was altered or affected; in short, to whom the zemindaree left by Jynaraen, now appertained in law? The pundits answered as follows, 1st, at the demise of Jynaraen, Ranee Soogunda, his step-mother, would take the zemindaree; not Bishenpirea, or the others. But they are entitled to suitable maintenance; 2nd, the title to the zemindaree, having once vested in Soogunda at the demise of Jynaraen, when Koochamunee was unmarried, cannot be altered or affected by the

subsequent birth of the appellant's son, or of the son of Koocha-munee. Soogunda's title is now good. 1801.

According to this *Vyuvustha*, the Sudder Dewanny Adawlut (present J. Lumsden and J. H. Harington) considered that the respondent (originally defendant) was the legal successor to the zemindaree; and affirmed the decrees of the inferior Courts, dismissing the claim of the appellant. (*a*)

Bishenpires
Munee, v.
Ranee Soo-
gunda.

NARAINEE DIBEH, Appellant,

1801.

versus

HIRKISHOR RAI, (a minor, Son of late JOOGULKISHOR, through his guardian), Respondent. Dec. 24th.

THIS was a suit brought by Narainee Dibeh in the Zillah Court of Mymunsing, in April 1793, or *Bysakh* of the Bengal year 1200, against Hirkishor Rai, to recover the *turuf Kurae*, a 4 ana share of pergunnah Mymunsing, which 4 ana share was formerly the zemundaree of Kishenkishor Rai, husband of the plaintiff. The following sketch of the family will tend to elucidate the case:—

A Hindoo zemindar, at his demise with-
out issue,
left two
widows; an
adopted
son of his
brother; and son of
his half-
brother.
The first
widow, and
then the
son adopted
by her under
due
authority,
died. The
other wi-
dow (who
stated that
she had al-
so adopted
a son after
the death of
the other,
under due
authority)

SRIKISHEN:

zemindar of pergunnah Mymunsing, &c.
left four sons, the 1st and 2nd by one
wife, the 3d and 4th by another.

1st.
Kisheukishor,
zemindar of 4 annas
in dispute, died in
1171, without issue,
leaving two widows,
viz.
1. Rutunmala, who
died in 1191, after
adopting Nundki-
shor; 2. Narainee
Dibeh, (the *Plain-
tiff*), who states
that she adopted
Ramkishor after
Nundkishor's death.

2d.
Kishengopal,
had no issue; but
adopted Joogulki-
shor, father of
Hirkishor (the *de-
fendant*).

3d.
Gunganaracen.

4th.
Lukbinaracen,
left two sons, viz.
Shamechunder and
Rooderchunder.

(*a*) The opinion delivered by the pundits in this case, must have been founded on a notion that the authorities of the law prevailing in Orissa are not those which are received in Bengal, but in the Dekhin: for in a law opinion delivered by the same pundits in the same year, (Narainee Dibeh against Hirkishor Rai,) they take this distinction, declaring, that according to the books current in Bengal, the step-mother does not inherit, but the natural mother only; and according to the books of the Dekhin (as the *Mitachara*, &c.) the single word mother moiety, (*mata*) is interpreted both mother and step-mother. But, as the authorities which were followed in Orissa are the same with those of Bengal, the grounds of the pundits opinion appears to be incorrect.

Nor do the books to which the pundits refer (viz. the *Mitachara*, &c.) allow that latitude of interpretation when expressly treating of the succession of parents to their children; but in other places where the question is different. From the text of the *Mitachara*, and the argument on which the author prefers the mother as step-mother before the father as successor to her son, it is apparent, that he meant the natural mother and not the step-mother (*Mitachara* on inheritance, Ch. 2, Sec. 3, was not

1801.

heir; but
that she
should 're-
cover one
moiety in
her own
right.'
Quere.

The Judge of the Zillah Court of Rajshahi (to which Court the cause was transferred, an alteration having been made in the limits of the jurisdiction) caused the question of law to be put to the pundits of the *Khalsa*; according to the answer of which persons, ten in number (confirmed by the zillah pundit) it appeared, that if the zemindar died without issue, leaving two widows, and the first widow adopted a son by authority for that purpose, the son so adopted became proprietor of the zemindaree; that after the adoptive mother's death, on the demise of this adopted son without issue, the zemindaree would go to the adopted son of the adoptive father's full brother, viz. the defendant's father; and not to the second widow, nor to a son adopted by her; and that, though the second widow, according to her declaration, should have made a second adoption (after that made by the first widow) under authority from her husband, such adoption could not be admitted. On the ground of this opinion, by which it appeared that the father of the defendant was the rightful heir at the demise of the son adopted by the first widow; and on the further ground of its appearing to the Zillah Judge, that the claim of the plaintiff, by reason of non-possession on her part within twelve years, was not cognizable, under the rule of limitation contained in section 14, regulation 3, 1793; judgment was passed against the plaintiff in the Zillah Court; which judgement the Provincial Court of Moorshedabad affirmed in appeal.

A further appeal having been brought by the plaintiff to the Sudder Dewanny Adawlut, some new documents were received from her, viz. 1st, copy of an order from the superintendent of the *Khalsa*, reciting, that the law opinion of the ten pundits was proved to have been corruptly given, in consideration of bribes received by the said pundits, and was not law; 2nd, copy of a decree of the Zillah Court of Mymensing of the 8th May 1795, in a suit by Joogulkishor (father of the present respondent) against Narainee Dibeh (present appellant) for the 4 ana zemindaree now in dispute; from which it appeared, that the claim was then dismissed, and it was determined that two anas of the four were the right of the then defendant (Narainee Dibeh) and her adopted son: and that the other two anas held by Rutunmala (elder widow of Kishenkishor), after the demise without issue of Nundkishor the son adopted by her, devolved to Shamchunder and Rooderchunder, sons of Lukhinaraen, half-brother of Kishenkishor; to which Shamchunder and Rooderchunder the same was adjudged accordingly; 3d, a decree of the Provincial Court of Dacca, reversing the above decree, on the ground of irregularity, because Shamchunder and Rooderchunder were not parties in the cause; and directing, that the 4 ana zemindaree should remain in possession of the defendant (Narainee Dibeh); and that Shamchunder and Rooderchunder, or Joogulkishor, might sue, *de novo*, in the Zillah

§ 3, and 5): nor is there any passage in books of authority, so far as research has gone, which expressly declares the step-mother's right of succession.

Upon the death of Soogunda, which has since taken place, the inheritance has devolved on the grandsons through females of her step-son's paternal grandfather; and has been adjudged to them against other claimants. (Sooluchna against Ramdolal Pande and others, before S. D. A. May 27, 1811.)

Court.—According to Joogulkishor's plaint in the above suit, as quoted in the Mymensing decree, it appeared, that Rutunmala died in 1191; and the respondent, in his answer to the present suit, admitted, that Nundkishor, the son adopted by Rutunmala, was after her decease possessed of full power over the whole estate left by Kishenkishor. And from *kubooleuts*, or engagements for the revenue of the 4 ana zemindary, for the years 1195, 1196, and 1197, it appeared, that till the last of those years, it was held in the names of Kishengopal, father of Joogulkishor, and of Kishenkishor, husband of the appellant. Therefore the ground taken in the zillah decree, that the cognizance of her claim was barred under the rule of limitation there referred to, was not admitted by the Sudder Dewanny Adawlut. Under a judicial sentence of the Provincial Council of Dacca, and a zemindary *sunnud* from the Government, dated the 31st *Asarh* 1181, by which, after the demise of Kishenkishor, his two widows, viz. Narainee Dibeh (appellant) and Rutunmala, were declared entitled to hold in equal shares the 4 ana zemindary left by him; the Sudder Dewanny Adawlut considered the right of the appellant to a moiety, that is, 2 anas, of the zemindary in dispute to be clear: but to ascertain whether she had any title to the other 2 anas, the share of Rutunmala, which, after her death, went to Nundkishor, adopted by Rutunmala, the Court proposed the following question to their pundits; viz. after the demise of Rutunmala, first widow of Kishenkishor, and of Nundkishor, the son adopted by her, without issue, who was heir to the 2 anas left by them? Was it the appellant, Narainee Dibeh, second widow of Kishenkishor? or Ramkishor, the son adopted by her, if he be really so? or the heirs of Kishengopal Rai, full brother of Kishenkishor? or the heirs of Gunganaraen and Lukhinaraen, half brothers of Kishenkishor? and does the case turn at all on the legality, or illegality of the adoption of Ramkishor by the appellant Narainee Dibeh? — *Answer*: “If after the demise of Rutunmala, first widow of Kishenkishor, her adopted son Nundkishor, adopted under due authority from her husband, died without issue, Nundkishor's 2 anas go to the adopted son of Kishengopal, full-brother of Kishenkishor (that is, to the cousin-german by adoption); not to the second widow of Kishenkishor (step-mother by adoption); nor to the heirs of Gunganaraen and Lukhinaraen (half-brothers of the adoptive father). If, however, the adoption of Ramkishor by Narainee Dibeh (the appellant) be a good adoption, then Ramkishor is heir to the 2 anas of Nundkishor. In the *shaster* there is no express prohibition, nor sanction, of two adoptions: if it be the usage in Bengal to make two adoptions, the adoption of Ramkishor is no doubt valid: and he succeeds to the 2 anas, as before stated. The reason why the step-mother of Nundkishor, that is, Narainee, the appellant, cannot succeed to his share, is, that in the *Duyabhaga*, and other authorities current in Bengal, wherever the word *matā*, or mother, occurs, it is explained to intend *jununee*, or actual mother. These books do not authorize the step-mother's succession. But she should receive a maintenance from the person who takes the inheritance. In the books of the *Dekkhun*, viz. *Mitacshara*, &c. the

1801.

Narainee
Dibeh, v.
Hirkishor
Rai.

1810. word *mata* implies both mother and step-mother : according to these, the step-mother would share."

Narainee
Dibeh, v.
Hirkishor
Rai.

After receiving the above opinion of their pundits, the Sudder Dewanny Adawlut (present J. Lumsden and J. H. Harington) determined, that the appellant should recover two anas of the property in dispute, as her ascertained right ; together with an account of mesne profits since the date of the suit ; but that her claim to the remaining 2 anas, to which, according to the opinion of the pundits, she, as step mother, was not heir, was not admissible. The decrees of the inferior Courts therefore, as far as they disallowed the appellant's claim to 2 anas, were reversed : and the appellant having made good half her claim, it was directed that she should recover half her costs in each of the Courts, from the respondent.

Ramkishor, the son adopted by the appellant, to whom, if his adoption were authorized, the 2 anas of Nundkishor would devolve according to the opinion of the pundits, not having been a party in the suit ; and the authority for his adoption, stated by the appellant, having been denied by the respondent, and not established in the cause ; it was provided, that he might have his separate action for the 2 anas in the Zillah Court. (a)

(a) A judgment passed by a competent tribunal, and *sunud* granted by Government, so far back as the Bengal year 1181, conferring the zemindary in equal shares on the two widows, governed the Court in its decision. But according to the principles of the Hindow Law (leaving out of consideration that prior judgment, which must have been passed before the adoption took place, or was completed) the succession passed from both of them to the adopted son : and judgment must have been given accordingly, if a claim had been preferred on the part of the adopted son for the property of his adoptive father held by the widow, provided the fact of a legal adoption under the requisite sanction from the husbands were duly established. Both shares, which the widows held as heirs of their husbands under the original judgment and *sunud* of 1181, devolved then, of right, on Nundkishor, considered as son by adoption of their husband. Upon his death, and subsequent adoption of Ramkishor (supposing the adoption legal and valid), the property passed to this second adopted son.

There can be no doubt, that, according to the doctrine which prevails in Bengal, the step-mother would not inherit from her step-son. But it does not appear that the pundits had sufficient authority for saying, that according to the doctrine of the *Dekhun*, a step-mother would inherit. (See Remark on the preceding case).

If the second adoption were void, the succession would pass, on the demise of the first adopted son, to the male issue of his adopted father's whole brother, in preference to the issue of the half-brothers ; and the adopted son of the whole-brother would take the succession on this ground, in like manner as if he were linear issue. *Jimuta Vahana*, Ch. 11, Sec. 6, § 2 ; and *Memo*, Ch. 9, v. 159.

The validity of the second adoption has been since tried and determined in a suit between the remaining claimants, namely, Ramkishor the adopted son, and Shamechunder and Rooderchunder ; and has been adjudged in favour of the adoption, on the questions both of law and fact.

The cause, it is to be observed, was that of successive adoption, the first having failed by death before the second took place. It rested on separate authority given by the husband to his second wife. But instances have occurred in which a widow has made a second adoption on the failure of the first by death, in fulfilment of a single injunction or authority from her husband ; the object of such injunction being unattained unless the child live. But the validity of a second adoption while another son, whether by birth or adoption, is living, would be a distinct question, on which writers of eminence have disagreed. *Jagannath* in his *Digat* (Vol. 3, p. 37) inclines to hold it valid. But the author of the *Dattaca Mimamsa*, a work of great authority, maintains the contrary opinion.

RAJCHUNDER NARAIN CHOWDRY, Appellant.

versus

GOCULCHUND GOH, Respondent.

ON the first of June 1792, Goculchund brought this suit against Rajchunder Naraen in the *Mal Adawlut* of Zillah Tipera (afterwards transferred to the Dewanny Adawlut of the Zillah), for a 7/12th share of *pergunnah* Baloopoor, the estate of Rajkishor, who died without issue in the Bengal year corresponding with 1789. The plaintiff claimed as sister's son of Rajkishor, alleging that, as such, he was entitled to take the inheritance. The defendant, son of a paternal uncle of Rajkishor, pleaded, that, as such, the succession vested in him. The Judge of the Zillah Court, according to opinions given by the majority of several pundits, adjudged, that the estate fell by law to the plaintiff, as sister's son of the deceased; and that Lukhipirea, step-mother of the deceased (who it would appear joined in the suit, and died soon after the zillah decree was passed), was entitled to maintenance.

The Provincial Court of Dacca, after taking an opinion from their pundit, affirmed this decree in appeal.

In a further appeal to the Sudder Dewanny Adawlut, the appellant objected to the above decrees, that they were founded on *Gour Shaster*, or law of Bengal, whereas the religious ceremonies of the ancestors and relatives of the claimant, who were Hindoos of Mithila, were always governed by the *Mithila Shaster*; the law of which should govern the right of succession in this case; and the rule of which law would vest the succession in him, the appellant. To this it was answered for the respondent, that the family had resided for generations in Bengal, were in fact naturalized inhabitants: that, the lands being in Bengal, the right of succession to them must be governed by the Bengal law; and that Bengal religious rites had been chiefly followed by the family. The Court had received the following questions to their pundits: By the law as received in Bengal, which of the parties has a right to the contested zemindaree? and which according to the Mithila law? and if a Hindoo of Mithila reside in Bengal, and regulate the religious ceremonies of his family, connected with funerals and marriages, by the *Shaster* of Mithila: or if a Hindoo of Mithila reside in Bengal, and regulate those ceremonies by the Bengal *Shaster*; in each case, by which law will his civil rights be determined? The answer of the pundits recited, that "if the family, being from Mithila, but dwelling in Bengal, performed religious rites with people of Bengal, and held a zemindaree in that province, then Goculchund is heir to it, conformably with Bengal law. But if the family merely dwelt in Bengal, and performed religious ceremonies with Mithila people, and observed the laws and usages of that province, then Rajchunder will inherit agreeably with the Mithila law." As it appeared therefore from this answer, that if a Hindoo of Mithila reside in Bengal, and follow the Bengal religious rites, and have a zemindaree in Bengal, his civil rights will be decided by the law of Bengal: that if he merely reside in Bengal, observing the religious ceremonies of Mithila, his rights will be decided by the Mithila law: that by the law of Bengal, the suc-

1801. cession vests in the sister's son, not in the son of the paternal uncle; and, by the Mithila law, vests in the son of the paternal uncle, not in the sister's son: evidence was taken, and transmitted, by order of the Court, as to the mode observed in religious ceremonies by the family of the person whose estate was in dispute; from which evidence it appeared, that the *purôhit*, or family priest, of each of the parties, was a Brahmin of Bengal; that the ancestors of the parties, whose family had been resident in Bengal for several generations, had intermarried with Bengal women; that the religious ceremonies connected with funerals or marriages, had been sometimes according to the Mithila, and sometimes according to the Bengal *Shaster*. Under the opinion given by their pundits; and on consideration that the contested lands were situated in Bengal; that the family had been long resident in Bengal; and that there had been no uniform observance of the ordinances of the Mithila *Shaster*; the Sudder Dewanny Adawlut (present J. Lumsden and J. H. Harington) held, that the case had been well determined by the Provincial Court according to the Hindoo law of Bengal; which allowed no title to the claimant. Final judgment was therefore passed affirming the decrees.

It should be observed, that the usual proclamation was made in the Zillah Court, for any other heirs who might claim a portion of the contested estate; but none, except the parties, were forthcoming. (a)

1801.

RAJBULUBH BHOOYAN, Appellant,

VERSUS

Ang. 14th.

MUSSUMMAUT BUNETA DE, Respondent.

ON the 23d of May 1795, Buneta De sued Rajbulubh Bhooyan, in the Zillah Court of Mymensing, for a third share of a 9 ana division of pergunnah Beerkol (on the part of herself and of two unmarried daughters) by right of succession to her husband Goureebulubh, lately deceased. The defendant, brother of the plaintiff's husband, and one of four sons, the other two of whom were surviving, denied that the plaintiff had a title to any share of the zemindaree claimed; for that it had been held undivided for many generations, and was not subject to division; that the husband of the plaintiff (the eldest brother) was proprietor of it; and, before his death, made it over to the defendant, by gift, with the condition that he should support the rest of the family. From the evidence in the case, the Zillah Judge considered the zemindaree to be

The eldest of four brothers, proprietors of an undivided estate, dies, leaving a widow; two daughters unmarried; and three brothers. His widow, by the Hindoo law as received in Bengal, takes his share of the estate.

(a) The Hindoo law, according to the doctrine of Bengal, is correctly stated, being exactly conformable to *Jimuta Vahana*, Ch. 11, Sec. 6, § 8. The books of greatest authority in *Mithila*, on the subject of inheritance, are silent in regard to the sister's son; and the established opinion is, that the male descendant of the remoter ancestor shall inherit, and not a descendant through females of a near ancestor. If the family had been shown to have continued in the observance of the natural law and usages, namely, those of *Mithila*, the rule of inheritance, as established in that province, must have been followed. By the disuse of them, and adoption of the customs and laws of Bengal, and employment of priests of this province in religious rites, the family was considered to have adopted Bengal for its country in all matters.

subject to division, and to have been the joint property of the four brothers. Witnesses brought to prove that the deceased made a verbal gift of the whole on the night before his death, to the defendant, were contradictory as to the fact; independently of showing, that the deceased was then not of sound mind. The Zillah Judge put the case to his pundit; 1st, if a coparcener in a joint hereditary zemindaree die, leaving a wife, two unmarried daughters, and three brothers; and the widow and daughters claim a share of the zemindaree, in his right: are they entitled to any, and what share? 2nd, supposing that the deceased, the eldest brother, in the night preceding the morning of his death, made an oral gift of the zemindaree to one of the brothers (the defendant), can such a gift hold good?—The pundit, in answer, declared, that of undivided property, devolving from an ancestor, each brother was entitled to an equal share: that if one brother died, leaving no son, but a widow and two unmarried daughters, the widow was entitled to the share of her husband: that the gift of an entire estate by an elder brother, while his other brothers, coparceners with him in the property, were alive, was of no effect. Under this opinion, the Zillah Judge decreed to the plaintiff, as widow of the deceased, a fourth share of the 9 ana zemindaree.

In appeal by the defendant from this decree, the Provincial Court affirmed it: as did also the Sudder Dewanny Adawlut (present J. Lumsden and J. H. Harington) in a further appeal; on the ground, that no gift of the zemindaree by the deceased, was established; and that the widow, as declared by the zillah pundit, was the legal successor to the share of her husband. (a)

1801.
Rajbulubh
Bhooyan, v.
Musann-
maut Bu-
neta De.

PRANNATH DAS, and others (paupers), Appellants,
versus

CALISHUNKUR GHOSAI, Respondent.

1801.

Aug. 29th.

ON the 12th of February 1790, Prannath Das and others sued Calishunkur Ghosal, to recover the talook Sealkautee, situated in a 5 ana, 15 gunda division of pergunnah Selimabad. It was set forth in the plaint, that the persons of whom the plaintiffs were heirs, were joint proprietors of this talook, held in the name of Gungapershad Das: that in the Bengal year 1186, possession was wrongfully taken from Gungapershad, on the part of the defendant's father, under pretence of a bill of sale in favour of the defendant, obtained by duress from Gungapershad; wherefore the

A, the manager of a joint talook held in his name, was put under confinement by the servants of the superior zemindar, for a balance of revenue; for which, seeing no other mode of discharging it, he executed a conveyance of the talook to B,

(a) The alleged gift not having been satisfactorily proved, and the deceased not being of sound mind at the time it was stated to have been orally made by him, the case resolved itself into a simple one of inheritance; and the widow was no doubt entitled to the succession, according to the Hindoo law as received in Bengal (*Jimuta Vahana*, Ch. 11, Sec. 1, § 20).

The gift of an entire estate by one of several coheirs to another of the coheirs would certainly be of no effect as far as it concerned the shares of other coparceners; and, in this limited view, the opinion of the pundit of the Zillah Court was correct. But the gift, if really made by a person of sound mind, would have been effectual as far as concerned his own share (*Jimuta Vahana*, Ch. 2, Sec. 30 and 31. *Jagannath*, Vol. 2, p. 58 and 216).

1801. plaintiffs sued to recover, on the ground that there had been no legal conveyance of their property. The defendant in his answer, pleaded, that the talook was sold by Gungapershad, of his (Gungapershad's) own free will, for the sum of 301 rupees; that the plaintiff's ancestors were never sharers in the talook: that the defendant had held undisturbed possession, under the conveyance, for ten years. The Judge of the Zillah Court passed a decree for the plaintiffs, on the 10th of January 1795, on the grounds, that the persons of whom the plaintiffs were heirs, appeared to have been sharers in the talook, with Gungapershad; that the sale was unfair; and that, at all events, one sharer could not have sold without the assent of the others. The Provincial Court of Dacca reversed this decree, and dismissed the claim, being of opinion that the plaintiffs had not proved either the duress alleged by them, or that their ancestors were sharers in the talook.

An appeal from the above decision having been brought to the Sudder Dewanny Adawlut, this Court considered the facts of the case to be as follows: The talook Sealkantee was, till the Bengal year 1186, held in the name of Gungapershad Das, with whom (though the respective shares were uncertain) there was sufficient ground to conclude that the ancestors of the appellants were sharers; and was at that time managed by Gungapershad. Jynarain Ghosal, father of the respondent, was *mokhtar-kar*, or manager of the division of pergunnah Selimabad, in which the talook is situated, on the part of the heirs of the deceased zemindar, or superior landholder. Ramsantoos Mokhurja, the person in charge of the collections on his part, confined Gungapershad in the stocks, in the zemindaree cutcherry, for a balance of revenue due on account of the talook in question. While Gungapershad was thus in confinement, he executed a deed of sale for the talook, in favour of the respondent, for the sum of 301 rupees; which sum was paid to him, and a receipt given by him for the amount. On the same day the amount was demanded, and received from him, as the balance of revenue due on the talook; and, the next morning, he was liberated. There was no evidence of duress, with respect to the execution of the conveyance; for it appeared that, with a view to his liberation, and seeing no other means of paying the balance due to the zemindar, he executed the conveyance of his own accord, though without the knowledge and assent of the other sharers, at the instance of the *mokhtar kar's* people. The present suit to set aside the sale was filed ten years after the date of the conveyance; and there was no proof of any previous demand, or complaint. The Sudder Dewanny Adawlut, putting the case to their *pundits*, required them to state, 1st, whether the conveyance executed by Gungapershad, while under confinement, and without the presence and assent of the other sharers in the talook, was, in Hindoo law, a valid conveyance? 2nd, whether, if the conveyance were invalid, the claim of Gungapershad, or of the appellants his co-sharers, was now precluded from being heard at law, by reason of Gungapershad not having preferred any suit before his death, and the appellants not having preferred one till after the lapse of ten years? or whether, notwithstanding the lapse of this period without any suit being preferred, the talook could now be

(the zemindar's *mokhtar-kar*) voluntarily, but without any express authority from the other sharers; who however allowed B. to hold possession undisturbed for ten years. In a suit against B. after this period, for the recovery of the talook, on the ground that the conveyance was void, as obtained by duress, and executed by one only of the sharers, the Sudder Dewanny Adawlut determine, in conformity with an opinion of their *pundits*, that the title of B. under the conveyance is good.

recovered by them, by reason of the conveyance being invalid ? 1801.

The answers returned to these questions were as follows : 1st, if Gungapershah, talookdar, had the entire management of the talook registered in his name, and, being unable by any other means to liquidate a balance of revenue due to the zemindar, did, in a time of distress, being in confinement on that account, execute, without the assent or presence of the other sharers, a deed of sale for the talook, to discharge the balance ; under such circumstances, the deed of sale is valid in law. For a passage of *Vyāsa* declares, ' Even one sharer may make a gift, mortgage, or sale, of immovables, in a time of distress, for the benefit of the family, and especially for religious purposes. 2nd, it appears from the second question proposed, that Gungapershad lived a long time after the execution of the conveyance ; that he did not prefer any suit respecting it in any Court ; and that the other sharers did not prefer any suit for more than ten years ; so that the respondent, with their knowledge, held undisturbed possession of the talook, under the conveyance, for the above period. Under such circumstances, the claim of Gungapershad's heirs or of the other sharers, cannot now be heard.

Prannath
Das, v.
Calishun-
kur Ghosal.

According to the above opinion of their pundits, the Sudder Dewanny Adawlut (present J. Lumsden and J. H. Harington,) considering that, under all the circumstances of the case, the conveyance executed by the managing partner was valid, and that the claim for recovery of the talook was not maintainable, affirmed the decree of the Provincial Court. (a).

(a) The subject of alienations by one of several coparceners without consent of the rest, is adverted to by *Jimuta Vahana* (Ch. 2, § 27,) and treated at more length in *Jagannath's Digest*, (Vol. 2, p. 56 and 215.) The opinion of the last mentioned compiler, and of authors quoted by him, on the general question of such alienations, decidedly is, that the sale or transfer is valid so far as concerns the seller's own share, but not so for the shares of his coheirs, who were not consenting. *Jimuta Vahana* is not equally explicit : but it does not appear from his text, or from the observations of his commentator, that his doctrine can be understood as going any further than to maintain the validity of a sale or alienation by a father of a family, for the whole patrimony, without consent of his sons ; or by a coheir, for his own share of the inheritance, without the assent of his coparceners. This remark is here made, because the authority quoted by the law officers, viz. a passage of *Vyāsa*, might be understood in a more extensive sense than it can safely be taken. Modified, however, as the opinion of the law officers expressly is, by the circumstances of the case, the single parcener who made the sale in question having been sole manager of the talook on behalf of himself and coheirs, and registered singly as owner of it, and having sold it for the liquidation of arrears of revenue due from that very talook, for which too the land itself was answerable, and the coparceners having acquiesced in his act by their silence during a period of ten years, that opinion as to the validity of the sale appears unobjectionable. The law recognizes the family arrangement by which one brother takes entire possession of the patrimony, and conducts the affairs of the family like a father. (*Jimuta Vahana*, Ch. 3, Sec. 1, § 15.) In this case, one of the coparceners having done so, and being the recorded proprietor and ostensible manager of the estate, and having sold it not for his own benefit, but for the discharge of the revenue for which it was answerable, must be considered to have made the sale on the part of his coheirs, as their agent and representative.

It should be observed, that the mode of confinement, which appears to have been practised in this instance, was no unusual exercise of authority by a superior landholder at the remote period when the transaction took place ; but has since been effectually prohibited.

1801.

GHOLAM HUSUN ALI,

versus

July 20th. ZEINUB BEEBEE (on the part of her son HIMMUT ALI, a minor),
Respondent.

In a suit by one son of a deceased Moohum--mudan against another son, for half of his estate, the Sudder Dewanny Adawlut consider that the plaintiff, son of the deceased by a slave girl, and the defendant, son of the deceased by his wife, were heirs in an equal degree. But the deceased had settled on the defendant's mother a dower of 300,000 gold mohurs; which at her death (before her husband) was demandable by her heirs. The husband, one of those heirs, gets 10 anas of her property (i. e. of the dower due), and the defendant, her son, 6 anas. These 6 anas, therefore, of the dower, were now de-

ON the 8th of February 1796, a suit was brought on the part of Himmut Ali, against Husun Ali, in the Zillah Court of Mymensing, for a half share of *kismut* 5 anas, 12 gundas, pergunnah Serialul, the zemindary of the late Gholam Jafur Ali; of which the annual produce was stated at 20,000 rupees. The plaintiff sued as son of the deceased, and as heir to his estate jointly and equally with the defendant, another son by a different mother. The defendant denied that the plaintiff had any valid claim; alleging, that he was not the son of Jafur Ali; and that his mother, Zeinub Beebee, was not married to Jafur Ali; and further, that Jafur Ali had assigned his zemindary to the defendant's mother Zebonnisa, in lieu of dower, at the time of their marriage, by a deed of marriage settlement then executed. The Zillah Judge, considering it proved from evidence in the case, that the plaintiff was the son of Jafur Ali, and equally his heir with the defendant, gave judgment in his favour for the share claimed.

The defendant appealed to the Provincial Court of Dacca, chiefly on the ground that no attention had been paid to the marriage settlement of his mother, the deed containing which he filed in Court. This deed, it should be observed, bearing date the 18th November 1774, specified the dower of his mother Zebonnisa at 300,000 gold mohurs, a third exigible immediately, and the remainder *mowujjul*, or delayed; and assigned to the wife, "in lieu of part of the dower, all property, of whatever sort, which the husband then possessed or might possess thereafter." The Provincial Court considered, that the deed of settlement was proved by evidence taken respecting it; that, as the wife was actually married, and the marriage consummated, it was valid, notwithstanding the wife was a fifth wife, and the marriage illegal: that the wife was entitled to claim under it a *mehr-i-misl*, or appropriate dower; which species of dower, however, the Court considered indefinite: that, under the deed, the estate might go to the wife for dower; though otherwise, both the parties would have shared equally as sons of Jafur Ali; that, on the wife's death, her estate (viz. the dower due) was divisible among her heirs, one of whom was her husband; and that, in the course of legal distribution, 11 anas fell to the defendant, viz. 6 by succession to his mother, and 5 to his father and grandmother; and 5 to the plaintiff, by succession to his father and grandmother. The Provincial Court accordingly amended the Zillah decree, and adjudged 5 anas of the estate to the plaintiff; with costs payable by each party.

In appeal against this decision to the Sudder Dewanny Adawlut, various objections were urged, the principal of which were, that the mother of the appellant was not the fifth wife, as the four slave girls (including the respondent's mother) were not married to the father, and the evidence brought respecting this marriage did not prove it; that the mother of the appellant was entitled to demand

the whole of the dower. The respondent, on the other hand, who was also dissatisfied with the decree, insisted, that the mother of the appellant, as being a fifth wife, and therefore not legally married, was not entitled to any dower whatsoever. 1801.

And it should be observed, with respect to the evidence to the marriage of Jafur Ali to his four slave girls, that two persons were brought to prove it, who deposed, that one morning Jafur Ali gave out that he was going to marry these slave girls; that he caused betel and *pun* to be prepared; that after distributing it, he took some himself, and sent some by a slave into an inner apartment to these girls, with an order to the slave to address, to each of them, the form of words usual in marriage; and that he returned, and said he had done so.

After considering the proceedings in the case, the Sudder Dewanny Adawlut proposed to their law officers the following questions, concerning the matters of law arising in the case, which it appeared necessary to determine: 1st, What forms are requisite to constitute *nekah*, or marriage? 2nd, What proof of such marriage is required by law? 3d, Is the marriage of a Moohummudan with his slave girl legal or not? 4th, Supposing a Moohummudan to have married four slave girls, and afterwards to have made a fifth marriage with a free woman, is such fifth marriage (the other four women being alive) valid in law, or not? 5th, Is the *Kabeen-nama* or deed of marriage settlement in favour of Zebonnisa valid in law, or not? And is such a *Kabeen-nama*, by law, and the usage of the country, if the wife be not divorced, binding on the person who executed it and his heirs, so as to entail on them a debt equal to the amount demandable by the heirs of the wife: or is such a *Kabeen-nama* only given to prevent the divorce of the wife, and is the amount of it not demandable, if either of the parties die, and divorce have not taken place? 6th, If Jafur Ali executed to Zebonnisa, at the time of his marriage, the *Kabeen-nama* abovementioned, and Zebonnisa, without ever having had possession of the property of her husband, died before him; can her heirs, after her death, take possession of the property of the husband, under the *Kabeen-nama*? and if they lay no claim to possession during the life of the husband, will his heirs, after his death, take his estate by inheritance? or her heirs take it under the marriage settlement? 7th, From the proceedings in the case, it has appeared, that Zebonnisa was married to Jafur Ali, and, after receiving the above *Kabeen-nama*, died before her husband, leaving two sons, Husun Ali and Aloo Thakoor: that then her younger son Aloo Thakoor died: and then Jafur Ali died, after holding full possession and control of all his property to the day of his death: that there were living at the time, Husun Ali, his elder son: Wulee Niamut, his mother; Zeinub, Gungea, Shubboo, and Fulanee, four slave girls of Jafur Ali (married to him according to the respondent's statement), and Himmut Ali, son of Jafur Ali by Zeinub, the slave girl abovementioned: that Wulee Niamut afterwards died. Who, therefore, at the demise of Jafur Ali, were his lawful heirs; and in what manner would his estate be distributed? And supposing Wulee Niamut to have been one of his heirs, to whom would her share fall at her demise? And if the marriage of the slave girls

1801.

Gholam
Hussein Ali,
v. Zeinub
Beebee.

with Jafur Ali be a point essential to the law of the case, the *futwa* should state the law in either case, of its being proved, or not proved.

The answers given to these questions by the law officers were as follow: 1st, To constitute marriage there should be the reciprocal expression of *ejaub-o-kubool*, declaration and consent; the man should say, "for such a dower, I have received such a woman in marriage;" and she should say, "I have agreed to it," or the woman's *vakeel* should say, "for such a dower I have given such a one to be the wife of such a one." and the man's *vakeel* should say, "on the part of such a one, I have consented." It is required that there be two free-men, of sound mind, of full age, and of the Moohummudan faith, or one man and two women with the same qualifications, present at the ceremony, to hear the mutual declaration. The preparing of *sherbet* and betle leaf, and giving the same to the bridegroom and bride, and distributing a portion to the persons present, are forms not requisite in law to the ceremony of marriage. 2nd, In testifying to a fact, it is necessary, in general, for the witness to have personally known it. But in questions of genealogy, marriage, and certain other matters, hearsay may suffice: provided the witness have the means of knowing the fact correctly, from general local report, or particular credible communication. 3d, The marriage of a Moohummudan with his slave girl is ineffectual and not binding: for lawful enjoyment, such as is obtained in marriage, accrues equally from the embrace of a slave girl. Modern lawyers have, on prudential grounds, held marriage with slave girls to be advisable; because a slave girl, in the legal acceptance, should be one taken from foreign infidels, or the offspring of such a one. With respect to ostensible slave girls, bought, in times of scarcity, at a low price, from Moohummudans or infidel subjects, and kept for concubinage, there is a doubt as to the legality of their embrace; wherefore marriage with them, to ensure the lawfulness of it, has been held preferable. 4th, though there should be proof to the marriage of Jafur Ali with his four slave girls: his marriage with them, if they be really slave girls, is not binding or valid. Therefore his marriage afterwards with a free-woman, would, in fact, not be a fifth marriage: and this marriage, notwithstanding the other four women be alive, will be valid and legal. Supposing, however, that, the four girls were not legally slave girls, but only commonly so reputed, then the marriage with them would be valid; and the marriage with the free woman, being a fifth marriage, not valid. But in an invalid marriage, dower is due after consummation: and in such case, which ever is the smaller of the *mehr-i-misl* or appropriate dower, and the dower appointed by the husband, that the husband should pay. The son of an invalid marriage has his parentage established. 5th, the *Kabeen-nama* of Zebonnisa, free woman, is authenticated by the evidence of the *naib cazee* and other witnesses: and the amount of dower, specified in such a deed, is, after consummation, due *in toto*, if the husband have not previously divorced the wife: and should be demanded at divorce, or on the death of the husband. It is payable by the husband, like other debts, on the demand of the wife, or her heirs: after the husband's death, his

heirs should pay it out of his estate. 6th, in the *Kabeen-nameh*, 1801. executed by Jafur Ali to Zebonnisa at the time of their marriage, two things are specified: one, the sum of dower payable by him; the other, that he gave every thing he possessed, of whatever sort, in lieu of "part of the dower." Now, this last being a stipulation of one thing in exchange for another; and, how much "part of the dower" might imply, being unknown; the latter stipulation is of no avail; and the wife does not take under it the property of the husband. But the wife, or her heirs, can claim the appointed dower from Jafur Ali, in his life; or from his heirs after his death. Therefore, after the death of Jafur Ali, his heirs had a right to take possession of his property: but the heirs of Zebonnisa, should, by obtaining an order from the ruler, cause that property to be sold, and take from the proceeds the dower due; or, with the consent of the heirs, should take possession of the property, of which the dower-debt absorbs the whole. 7th, as Zebonnisa died leaving two sons, Husun Ali and Aloo Thakoor; and a husband, Jafur Ali; her estate, that is, the dower due, would be divided into 8 parts, three of which would go to each of the sons, and 2 to the husband. On the demise of Aloo Thakoor, the three shares, his due, would go to his father Jafur Ali. Therefore, the five parts which fell to Jafur Ali, would be deducted from the sum of dower demandable from his estate. The other three shares of the dower, or 6 anas of 16, would be the right of Husun Ali. And as Jafur Ali died, leaving heirs, an eldest son, Husun Ali; a younger son Himmud Ali; a mother, Wulee Niamut; and Zeinub, claiming as a wife; in such case (supposing Zeinub to be a wife) the estate will be divided into 48 parts; of which 17 will go to each of the sons; 8 to the mother; and 6 to the wife. Supposing Zeinub not to be a wife, the estate will be divided into 12 parts, of which 2 will go to the mother, and 5 to each of the sons. But the sum of dower specified in the deed of marriage settlement being immense, after deducting 10 anas of 16 still there will remain more than a lack of gold mohurs, the right of Husun Ali; so that dower-debt, which must be liquidated before there can be any division of heritage, will absorb the whole estate. Of the two parts of the estate due to Wulee Niamut, equal shares would fall, at her demise, to Husun Ali and Himmud Ali.

Under the above *futwa*, the Court considered that the respondent, as the son of Jafur Ali by Zeinub a slave girl, was entitled to inherit as other sons; and that, had the estate of Jafur Ali been divisible among heirs, Husun Ali and Himmud Ali, as his sons, would have been entitled each to take 5 shares of 12; and to divide between them the remaining two shares, which would have fallen to Wulee Niamut, as being her grandsons: but as the share of the dower which was demandable from the estate, and to which the appellant was heir, absorbed the whole of it; and claims of dower must be satisfied before partition of heritage: the Court determined (present J. Lumsden and J. H. Harington), that the claim of the respondent to a share of the estate by inheritance from his father, could not be admitted. Judgment was therefore passed, reversing the decrees of the Zillah and Provincial Courts; the appellant being at the same time enjoined to afford a maintenance to

Gholam
Husun Ali,
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Beebee.

the respondent from the estate. And the appellant having denied that the respondent was a son, or heir of the father, was not allowed his costs; but, in all the Courts, they were made payable by the parties respectively. (a)

1801.

MUSNUD ALI, Appellant,

versus

Aug. 14th.

KHOORSHEED BANOO, Respondent.

At the suit of a widow against the brother of her husband, for her husband's estate, under a deed making a gift to her of all his property in lieu of dower, adjudged, that the widow was entitled to take under this deed all property possessed by the husband at the date of it; and, in the property subsequently acquired, Hosein Ali then possessed, and might possess thereafter, was given had a right in lieu of the dower " The date of this deed was torn and illegible; but the date of the marriage was mentioned in it as the 19th of April 1768. There does not appear to have been any evidence forthcoming as to the execution of this deed. The second was a deed of gift (*hihek bil-iwuz*) the date corresponding with the 25th of September 1768, assigning to Khoorsheed Banoo, in lieu of the dower specified in her marriage settlement, the whole of the property Hosein Ali possessed, of whatever description. This deed bore the seal of Moohummud Kudul, *cazee*, before whom it purported to have been executed; but there was no attestation of witnesses, nor signature of the person who executed it. The abovenamed *cazee*, however, and the person who drew the deed, deposed in Court, that it was drawn in the presence of Hosein Ali, at his desire, and sealed, on his acknowledgment of the contents. The evidence of other witnesses for the plaintiff went to

Two deeds were brought forward by the plaintiff; the first a *Kabeen-nama* or deed of marriage settlement, with the seal and signature of Hosein Ali, and attested by five witnesses; reciting, that the dower of Khoorsheed Banoo had been settled at 700 gold mohurs, and 1,000 rupees; a third payable immediately, and the remainder not exigible during the continuance of the marriage; and with four stipulations, one of which was, that " the property Hosein Ali then possessed, and might possess thereafter, was given in lieu of the dower " The date of this deed was torn and illegible; but the date of the marriage was mentioned in it as the 19th of April 1768. There does not appear to have been any evidence forthcoming as to the execution of this deed. The second was a deed of gift (*hihek bil-iwuz*) the date corresponding with the 25th of September 1768, assigning to Khoorsheed Banoo, in lieu of the dower specified in her marriage settlement, the whole of the property Hosein Ali possessed, of whatever description. This deed bore the seal of Moohummud Kudul, *cazee*, before whom it purported to have been executed; but there was no attestation of witnesses, nor signature of the person who executed it. The abovenamed *cazee*, however, and the person who drew the deed, deposed in Court, that it was drawn in the presence of Hosein Ali, at his desire, and sealed, on his acknowledgment of the contents. The evidence of other witnesses for the plaintiff went to

(a) The principles on which the law opinion in this case is grounded, will be found in the *Hedaya* (Vol. 1, p. 72, 74, 84, 88, 146 and 156); and, on the subject of the distribution of the inheritance, in the *Sirajiyah*.

prove, that part of the landed property of the deceased (the title deeds for which were dated after the *Hibeh-nama*) was purchased with money of the plaintiff; but it should be observed that this evidence was not clear or consistent; and the title deeds were in the husband's name. On the part of the defendant a deed was filed, purporting to have been executed by the plaintiff, relinquishing all claim under the head of dower, in consideration of three gold mohurs received from the defendant's mother. This was evidently an improbable deed; was denied by the plaintiff to be genuine; and was not proved. The Zillah Judge, after taking opinions from his law officer, considered the second deed produced on the part of the plaintiff sufficiently established; and on the ground that, under this, she was entitled to the property belonging to the husband at the date of it; and to the remaining immovable property, as having been purchased with her money, a decree was passed in her favour; which in appeal to the Provincial Court of Dacca, was affirmed.

1801.

no subscribing witnesses. Another deed (of marriage settlement) to which the above apparently referred, but to the execution of which there was not the requisite proof, provided, that,

In appeal by Musnud Ali from the above decisions to the Sudder Dewanny Adawlut, it was insisted, 1st, that the proof to the *Hibeh-nama* was not legally sufficient; 2nd, that the evidence to the purchase with money of the respondent, was not credible; for nothing had been alleged respecting it at first, the claim having been rested altogether on the above deed. After considering the proceedings, the Court delivered them for the perusal of their law officers, to whom the following questions were proposed; 1st, is the *Kabeen-nama*, purporting to bear the signature of Hosein Ali, and the attestations of five witnesses, a legal and valid deed of marriage settlement according to the Moohummudan law, supposing the execution of it established? 2nd, is the *Hibeh-nama*, purporting to bear the seal of *cazee* Kudul, but without any signature of the donor, or of attesting witnesses, a valid deed of marriage settlement, supposing the execution thereof, on the declaration of the donor, to be established by the evidence of the *cazee* whose seal is affixed to it, and of the *moon-see*, who, by order of the *cazee*, drew it up? 3rd, supposing either of the deeds abovementioned to be legal and valid, is the wife, in whose favour such deed may have been executed, entitled thereby, under the Moohummudan law, to succeed, on the death of her husband, to the whole of the estate left by him, real and personal, whether acquired before or after the execution of the deed, to the exclusion of other heirs; or, if not to the whole, is she entitled to any part; it being observed, that, at the death of the husband, there were living, besides the widow, his minor son, his mother, and his brother? 4th, if, of the persons abovementioned who survived the husband, the son and mother have died; and consequently the surviving heirs are the brother, and the widow (possessing the *Hibeh-nama*), to what share will the widow be legally entitled by inheritance?

The answers given to the above questions were these; 1st, if it be proved on the evidence of the attesting witnesses, that Hosein Ali, in their presence, declared the sum stated in the *Kabeen-nama* to be due from him to his wife; and that the *Kabeen-nama* was executed on such declaration; it is without doubt a good and legal instrument. 2nd, though the *Hibeh-nama* be contrary to

in lieu of her dower, the wife should take all the property the husband then possessed, and might possess thereafter." The law officers declare, that this could only have conveyed the property possessed by him at the time.

1810.

Musnud
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Banoo.

the usual from of legal instruments, as not bearing the seal or signature of the donor, and having the *cazee's* seal affixed without his signature, and having no other witness; yet, if the acknowledgment of the donor to the gift of the property stated in the deed, be proved by the testimony of the *cazee* whose seal is affixed, and who is one witness; and by the evidence of the person who drew the instrument; the gift will be valid. 3d, supposing either the *Kabeen-nama* or *Hibeh-nama* to be valid, which last moreover contains a gift by the husband to the wife of the whole property possessed by him, in lieu of dower, the wife will take the whole property movable and immovable possessed by him at the time, in lieu of the dower-debt, to the exclusion of heirs. The *Kabeen-nama* specifies a gift of property then possessed by the husband, and of property he might thereafter acquire: but the gift of property then nonexistent is not good in law. But the circumstance of existent and nonexistent property having been coupled together, will not invalidate the gift of the property then existing. The property acquired by Moohummud Hosein subsequently to the gift, will be thus divided among the heirs, according to the Moohummudan rules of distribution; viz. first, such property being divided into 24 parts, the widow Khoorsheed Banoo will take 3; the mother 4; the son 17. On the son's death, 1 share falls to his mother Khoorsheed Banoo; 2 to Musnud Ali, his uncle. Hence, supposing the property hereditary and divisible, and the heirs no more than above stated, then, of the whole property acquired by Moohummud Hosein after the gift, divided into 72 parts, the widow Khoorsheed Banoo would take 26; the brother Musnud Ali 46.

Under this *futwa* the Sudder Dewanny Adawlut determined, (present J. Lumsden and J. H. Harington), that the deed executed by the husband on the 25th of September 1768, and settling on the wife by gift in lieu of dower due, all the property he possessed, was a valid instrument, and that in virtue of it, the widow (or respondent) was entitled to take the property then possessed by her husband, to the exclusion of heirs; that, of his property acquired subsequently to the above date, and belonging to him at his death, 26 parts of 72 should go to the widow by right of inheritance, and 46 by the same right, to the brother, or appellant. A decree was passed accordingly, amending the judgments of the Courts below; and directing, that the widow (or respondent) should have possession of the part of the property to which her title was declared, as above related, by virtue of the deed, and by inheritance, with an account of mesne profits. (a)

(a) The maxim, that a thing not existing cannot be a subject of gift, will be found in the *Hedaya*, vol. 3, p. 295.

The distribution was according to the rules of inheritance: a widow taking an eighth, if there be children; and a mother a sixth if there be children; and a third if there be none, nor brother and sisters. *Sirajiyah*, p. 4, and 8. The residue went to the male heir as sole residuary. *Ibid*, p. 10.

MEER ALEEM ULLAH, Appellant,

1801.

versus

ALIF KHAN, Respondent.

Sept. 30th.

ALIF KHAN brought this suit against Aleem Ullah in the Zillah Court of Behar, in July 1794, corresponding with the end of *Srawun* of the *Fusslee* year 1201, to recover the mouza Kuleed, "nuzuree and altumgha mehal," alleged to be the right of the plaintiff by inheritance from his late father Fehumdad Khan. The defendant pleaded, that the mouza was his by purchase; for, at the demise of Mohabut Khan, the plaintiff's grandfather, it fell to his two sons Fehumdad Khan, the plaintiff's father, and Bakir Khan, his uncle; that Fehumdad Khan, in 1190, fell in balance for the revenue of his half, and Jumeut Khan, constituted attorney on his part, sold his moiety to one Bhuwanipershaud for 301 rupees, from whom the defendant bought it, at the same price; that the other moiety was sold to the defendant in 1192, by Fakeerdad Khan, son of Bakir Khan. The Judge of the Zillah Court, on the ground of its appearing to him from the evidence adduced, that the entire mouza was the property of the plaintiff's father; that one moiety was legally transferred, on the part of plaintiff's father, by a *bye-bil-wufa* sale, to Bhuwanipershaud, and purchased from him by the defendant; but that the sale of the other moiety, made by Fakeerdad Khan, was invalid, inasmuch as he, Fakeerdad Khan, had no right to sell it; passed a decree, adjudging to the plaintiff the recovery of this moiety, with *malikana*, or proprietary profits, at the annual rate of 155 rupees, for the *Fusslee* years 1202 and 1203.

In appeal to the Provincial Court of Patna (before which Court some further evidence was taken) the Zillah decree was amended, and a fourth of the mouza only (viz. half of the above moiety) adjudged to the claimant, on the ground that the moiety sold by Fakeerdad Khan, was the joint right of him and Fehumdad Khan; that he might dispose of half of it; but the other half must go to the claimant.

The case having come before the Sudder Dewanny Adawlut in a further appeal, the facts, in detail, appeared to the Court to be these: The mouza in question was purchased by Mohabut Khan, on whose death his sons, Fehumdad Khan and Bakir Khan jointly succeeded to it: and on the death of Bakir Khan, his two sons, Himmut Zeman Khan and Fakeerdad Khan, succeeded to his share in it. The mouza all this time was a joint undivided property. The annual *kuboleut*, or engagement for revenue, was sometimes in the name of one sharer, sometimes of another. In 1188, it was in the name of Himmut Zeman Khan: in 1189, in that of Fakeerdad Khan; and in 1190, in the name of Fehumdad Khan; and Jumeut Khan was security, on his part, for the stipulated revenue, to Aleem Ullah on the part of the provincial *aumil*. To this Jumeut Khan, the security, Fehumdad Khan executed a general power of attorney (*motluk vukalat-namah*), empowering him "should he have any balance to pay as security, on account of revenue of the mouza, to sell a portion of

A *bye-bil-wufa* sale of land, made by an agent on the part of the owner, declared void in *Moo-hummudan* law, from the agent having exceeded his powers: from its being a sale at gross inadequacy of price: and from the presumption of collusion between the buyer and agent.

1801. it, sufficient to realize the balance." At the end of 1190, there was a balance of 176 rupees due on account of the mouza : and for 1189, (in which year the *kubolent* was in the name of Fakeerdad Khan, and Fehumdad Khan was security) there had been a balance of 104 rupees. Aleem Ullah therefore had a demand against Fehumdad Khan, altogether, of 280 rupees. Jumeut Khan, under the power of attorney from Fehumdad Khan, in the month of *Rumzaun* 1190, executed deeds of mortgage and conditional sale (*bye-bil-wufa*) for half the mouza, redeemable within a year, to one Bhuwanipershaud, for the sum of 301 rupees. Within the term of these deeds Fehumdad Khan died ; the money was not repaid : and the sale having become conclusive, Bhuwanipershaud entered on possession : and, in the succeeding year (1192) sold the moiety for the same price of 301 rupees, to Aleem Ullah the appellant. On the death of Fehumdad Khan, at which time there was no intelligence of Alif Khan his son, who had entered into foreign military service, his brother's son, Fakeerdad Khan, held the remaining half of the mouza ; and, soon after, sold it to Aleem Ullah, on the part of himself and his brother, for 1,201 rupees ; from which time the latter held possession. In 1201, Alif Khan, son of Fehumdad Khan, made his appearance, from Madras : and in 1202, filed the present suit, for recovery of the whole mouza, against Aleem Ullah. And after the suit was commenced, Aleem Ullah executed a sale of the whole mouza to one Bhukoo Pande for 2,501 rupees, with an agreement that other lands should be assigned in lieu of them, equal in value to the price stipulated, if judgment went finally for the claimant.

These being the facts, the following questions were proposed to the Moohummudan law officers, respecting the law of the case as applicable to the deeds of conveyance, of which the validity was denied by the appellant, who insisted, generally, that the *bye-bil-wufa* conveyance was invalid. 1st, considering the circumstances stated, was the *bye-bil-wuffu* sale, by Jumeut Khan to Bhuwanipershaud, under the power of attorney from Fehumdad Khan, valid or not ? and by reason of the nonpayment of the amount within the term specified in the deed ; did or did not the lender, at the expiration of the term, acquire an absolute property in the moiety of the mouza ? 2nd, after the death of Fehumdad Khan, at which time his son Alif Khan, was not forthcoming, were Fakeerdad Khan and Himmud Zeman Khan, his brother's sons, and co-sharers with him in the mouza, at liberty to alien the whole remaining moiety of the mouza ? and is the deed of sale by Fakeerdad Khan to Aleem Ullah, valid or not ? 3rd, was Alif Khan, after making his appearance and preferring his claim in 1202, entitled to obtain any share of the mouza ? and, if so, what share can he now claim ?

The answers given were these ; The first sale, of half the mouza, made to Bhuwanipershad by Jumeut Khan, as attorney on the part of Fehumdad, is invalid, on several grounds : 1st, according to the power of attorney, the surety was empowered to sell so much of the mouza as should be sufficient to cover the balance which might arise. Therefore he ought to have sold a fifth, or a sixth part of the mouza, sufficient to pay the balance of 1190 ;

and not to have exceeded such proportion. 2nd, The sale of this moiety for 301 rupees, is a sale at gross inadequacy of price (*ghubun-i-fahish*); for the sale of the other half, by Fakeerdad Khan to Aleem Ullah (and from him again to another person, since this suit commenced), shews, that a moiety of the mouza was worth more than 1,000 rupees. According to Moohummud and Yusof, an agent on the part of another cannot sell at gross inadequacy of price (*noksani-fahish*). Indeed, according to Aboo Huneefa, such a sale, suspicious on the face of it, is invalid, as is explained in the *Hidaya*: and here it is clear that Aleem Ullah colluded with Jumeut Khan, to get the half mouza at a low price. 3rd, In the deed, there is first stipulated an absolute sale: afterwards, at the end of it, it is additionally stipulated, that, if the seller shall repay the purchase money within a year, the sale shall become void. The author of the *Buhr-i-rayik* says, such a condition is illegal, except it be for three days only, according to Huneefa and Aboo Yusof; but according to Moohummud it is legal, without restriction, as a *shert-i-khiar*, or optional condition. The sale from Jumeut Khan, on the part of Fehumdad Khan, not having been legal, a right of property did not vest in Bhuwanipershad after the expiration of the term; and he (Bhuwanipershad) consequently could not sell the moiety to Aleem Ullah. 2nd, The mouza having been the joint property of Fehumdad Khan and Bakir Khan, by inheritance from their father: the sons of Bakir Khan, joint proprietors of the second half by inheritance from their father, could, at their option, without the concurrence of Alif Khan, sell their joint half. Therefore the conveyance by Fakeerdad Khan to Aleem Ullah is valid. 3rd, The claim of Alif Khan to the first moiety, sold illegally by Jumeut Khan, is valid, on the ground of inheritance from his father. He may, by law, under a judicial sentence, recover possession of the moiety, refunding the sum paid as consideration.

Under the above opinion of their law officers, the Sudder Dewanny Adawlut (present J. Lumsden and J. H. Harington) determined, that the *bye-bil-wufa* conveyance of the first moiety, by Jumeut Khan to Bhuwanipershad (and consequently the conveyance from him to the appellant) was void by reason of the inadequacy of price, and the other grounds stated in the *Futwa*; and that the respondent should recover this moiety as heir of his father. The mesne profits since the date of the action, receivable by the respondent, were about equal to the amount of purchase money which he had to refund to the appellant: so that one demand extinguished the other. Judgment was therefore passed, amending the decree of the Courts below, and adjudging possession of the moiety above specified to the respondent, with costs against the appellant. (a)

(a) In the cause 'Busunt Ali Khan against Ramkomar,' decided by the Sudder Dewanny Adawlut on the 4th of January 1799, there was a question put to the law officers respecting the legality of *bye-bil-wufa* sales, though the cause, as it happened, went off on a question as to the competency of the agent who made the *bye-bil-wufa* sale in that instance on the part of another. It was stated in the *Futwa* then given, that a sale, with optional condition for three days, is good; but for more than three days is not good, according to Huneefa

1802. NEELKAUNT RAI (Son of BISHENNATH CHOWDRY, deceased),

Appellant,

June 25th.

versus

MUNEE CHOWDRAEN, Respondent.

The second of three brothers, living together and possessing an undivided hereditary zemindary, dies, leaving, besides his brothers, a widow, and a daughter unmarried. The widow, defendant's son Neelkaunt, under date the 7th *Aghun* 1195, for requiring a division, takes his share of the estate, viz. a third; the partition among brothers being equal.

IN May 1794, or *Jeth* of the Bengal year 1201, Munees Chowdraen brought this suit in the City Court of Moorshedabad against the late Bishennath Chowdry, for 5., 6., 3. or a third share of the pergunnah Chunakhali, by right of succession to Hurripershad, her deceased husband. The abovementioned pergunnah was formerly the zemindaree of Sheonaraen Rai, who held it till the Bengal year 1183; when he died, leaving three sons, of whom the plaintiff's husband, Hurripershad, was the second. The three sons held the estate jointly till 1193, when Hurripershad died; leaving his two brothers; the plaintiff his widow; and an unmarried daughter. The plaintiff claimed a third of the estate as his heir. The defendant, against the claim, set up a deed of gift alleged to have been executed by Hurripershad, in favour of his (the defendant's) son Neelkaunt, under date the 7th *Aghun* 1195, for the disputed share of the zemindaree, reciting, that the gift was made to him as son of the elder brother; and stipulating, that the donee should support the widow and provide for the marriage estate, viz. of the daughter. This purported to have been executed on the night before Hurripershad died; and the defendant alleged the motive of it to have been that Hurripershad, having no son himself, had taken a great affection for the son of the defendant. The plaintiff, in her reply, denied the authenticity of this deed of gift; and adduced an *Ikrar-nama* purporting to be by the defendant, under date the 30th of *Jeth* 1197, admitting her title to a third of the estate, her husband's share. Evidence taken by the City Judge as to the execution of the several instruments, proved the second; but was unsatisfactory as to the first. On the ground that the second, at all events, superseded the first, the City Judge gave a decree for the plaintiff, for the share claimed; which decree the Provincial Court of Moorshedabad affirmed in appeal.

A further appeal was brought to the Sudder Dewanny Adawlut by the defendant, insisting, 1st, that the deed of gift was genuine, and the other instrument not. 2nd, that, supposing the deed of gift disallowed, it had not been ascertained, whether, by law, the plaintiff was entitled to a third share of the estate as heir of her husband; or whether she was only entitled to maintenance. The Court put the following question to their pundits: If one of three

and Yosuf: but according to Moohummud, for four days, or even a longer period, is good: that, the sort of sale being prevalent in the country, Moohummud's opinion should be followed.

The intention of the parties, as collected from the tenor of the deed, shews whether the *bye-bil-wafa* be a sale with the reserve of an option of retraction within a limited time, or a mortgage for the security of money lent. A stipulation for a short period must be considered to mark that a sale was in the contemplation of the parties; a long term denotes a mortgage, or security for a loan: and such mortgages in the form of conditional sales are very common, and rightly held valid under the opinion here cited.

In the present case, the inadequacy of the consideration was a sufficient ground for allowing the equity of redemption, under the exposition of the Moohummudan law, that inadequacy of price vitiates a sale by an agent. See *Hedaya*, 3, 32.

brothers, living together and possessing a joint zemindaree, die leaving a widow, an unmarried daughter, and two full brothers, one older, the other younger, than himself; who is heir to his share of the zemindaree, by the law of Bengal? and, on a partition of the zemindaree, is the share of each brother equal?

1802.

Neelkaunt
Rai, v. Mu-
nee Chow-
draen.

The answer returned was, "that if, of three brothers living together, one die, leaving a widow, and a daughter unmarried, the widow takes his share of the estate: not the brothers. On a partition of the zemindaree, a twentieth part being first deducted for the elder brother, the partition will not be unequal, according to the law as laid down in the *Dayabhaga*. But the previous deduction of a twentieth part for the elder brother, is not usual in the *Caliyug*, or present age." The Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harngton), after receiving this *nyuvustha*, affirmed the decrees of the lower Courts. (a)

DULJEET SING, Appellant,
versus
SHEOMUNOOK SING, Respondent.

1802.

Sept. 7th.

IN September 1797, or *Bhadon* of the *Fusslee* year 1204, Sheomunook Sing sued Duljeet Sing in the City Court of Benares, for a moiety of the zemindaree right of the talook Jughnee, in pergunnah Keswar, of which talook the annual *jumma* was stated at 12,730 rupees. The following sketch shews the descent of the parties:

The proprietor of a talook in Benares died, leaving three sons. The first son died leaving a son, the plaintiff; afterwards the second son died. Plaintiff, the grandson, sues defendant, the third son, for a partition, and his share; and there are surviving parties, two widows of the second son. Adjudged, that the plaintiff and defendant

RAMROOJ SING left three sons :

1.	2.	3.
Bhoopnaraen Sing, Sheomunook Sing, Plff.	Premnaraen Sing, died without issue, but left two widows, still surviving.	Duljeet Sing, Defr.

The plaintiff demanded a partition of the talook, and claimed a moiety on the ground that he was entitled by inheritance to an equal share with the defendant, of the talook formerly belonging to Ramrooj. The defendant pleaded, 1st, that neither the plaintiff nor his father had ever possessed any share of the talook, and that the plaintiff could not now be admitted to claim a share; 2nd, that the plaintiff had resigned any claim he might eventually have had. The defendant accordingly produced an instrument termed *Baz-nama*, or deed of renunciation, under date the 4th *Koar* 1197, not signed by the plaintiff, but alleged to be in his handwriting, setting forth, that he was confined by the Raja of Benares, for a balance of revenue due on account of pergunnah

(a) The passages of *Jimuta Vahana's Dayabhaga*, alluded to in the opinion of the pundits, occur in Ch. 11, Sec. 1, § 6, 19, and 20; and Ch. 3, Sec. 2, § 27; and entirely support the law opinion delivered in the case.

1802.

inheritance; and that the widows receive maintenance. But it afterwards appears that the parties had withheld from the knowledge of the Sudder Dewanny Adawlut a decree of the Provincial Court (passed during the appeal to the Sudder Dewanny Adawlut) adjudging to the widows a third of the talook, under a deed executed by their husband. Ordered, therefore, that the parties get each half of the remaining two-thirds. The respondent fined 100 rupees by the Sudder Dewanny Adawlut for mistating facts to the Court, with respect to the said decree of the Provincial Court, with a view to obtain an order for the enforcement of the

Koond, and was released on the defendant's paying the money for him, to the Raja; in consideration of which the plaintiff relinquished all claim to a share, or division, of the talook in question. To prove the execution of this, three witnesses were brought, all servants of the defendant. But they disagreed one with the other, and the Raja of Benares, being called on by the Court for information whether any payment of revenue had been received from the defendant on account of the plaintiff, for the pergunnah Koond, certified (in writing) that no payment had been received through the defendant. The City Judge consulted his pundit on the case; who gave an opinion, that, from the alleged deed of renunciation, it was sufficiently clear that the zemindaree had not been divided in the time of the plaintiff's father, that is, that it was an undivided property (which appears to have been the fact): that, the zemindaree having belonged to the grandfather; and one of the plaintiff's uncles, besides his father, being dead; the zemindaree must now belong half to the plaintiff and half to the defendant. According to this opinion, the City Judge gave a decree for the plaintiff, for the moiety claimed; and, in appeal to the Provincial Court, it was affirmed; the judgment providing, that nothing in it should be considered to bar any right which the widows might possess.

A further appeal was brought to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington) by the defendant, insisting, 1st, that the deed of renunciation was valid: 2nd, that, nothing against the right of the widows having been decided by the other Courts, the plaintiff, at any rate, could not obtain so much as a moiety. To this the respondent objected, that the widows would by law only receive maintenance. The Sudder Dewanny Adawlut, setting aside the first plea, put the case thus to their pundits, as to the question of inheritance. Baboo Ramrooj, zemindar of the talook, died leaving three sons, Bhoopnaraen, Premnaraen, and Duljeet. After his death, Bhoopnaraen managed the talook on the part of the three sons; and died leaving a son, Sheomunook. After this, Premnaraen managed the talook; and died without issue, leaving two widows, Bukhtkonwur and Binutkonwur. After this Duljeet managed the talook. Sheomunook sues for partition, and for a share of this hereditary estate. By the Hindoo law, as established in the province of Benares, what share falls to Sheomunook; and are the widows of Premnaraen entitled to any share or not?—The pundits declared in answer, that the widows were entitled to no share, but had a right to maintenance from the estate; that, the estate being divided, Sheomunook and Duljeet would each take half. The Sudder Dewanny Adawlut affirmed the decrees of the lower Courts; and issued the usual directions for carrying the judgment into effect. But on the 25th of February 1803, a petition was presented to the Court on the part of Sheomunook Sing, setting forth, that, while the cause between him and Duljeet was depending in appeal before them, Duljeet (the original defendant in that cause) having learnt that the widows of Premnaraen would only be entitled to maintenance, had, with a view to defraud the petitioner, induced them to bring an action against himself, in the Benares City Court, for a third of the talook; in which action judgment had gone in favour of the plaintiffs, on the defendant's

admission of their title; which judgment the Provincial Court had affirmed in appeal: that the Provincial Court therefore did not execute the decree passed by the Sudder Dewanny Adawlut in the petitioner's favour, adjudging to him a moiety of the talook; which decree the petitioner prayed might be enforced. 1802.
decree of
the Sudder
Dewanny
Adawlut,

The Sudder Dewanny Adawlut having no information of the suit mentioned by the petitioner, called on the Provincial Court to transmit the decrees, if any such had been passed. And it appeared from the return made, that on the 3d of May 1799, the widows of Premnaraen had sued Duljeet and Sheemunook in the Benares City Court, for a third share of the talook, under a deed of gift to them from their husband, and two written acknowledgments by Duljeet and Sheemunook: that in September following, they obtained a judgment for the share claimed; which judgment the Provincial Court affirmed in appeal, in May 1800, reciting in their decree, that the documents of the plaintiffs were proved, and that Sheemunook, in the pleadings in appeal, admitted them. And the facts represented to the Sudder Dewanny Adawlut by Sheemunook in his petition, turned out to have been wilfully misstated. The pleader of Sheemunook, who presented the petition on his part to the Court, stated, in answer to questions put to him, that it was transmitted to him by an agent on the part of his client; that he could not answer for its contents; and that, while the appeal was depending before this Court, he was not informed of the suit relative to the third share. which the
Provincial
Court had
delayed un-
til further
instruc-
tions.

The Sudder Dewanny Adawlut directed that Sheemunook, for the false statement, made with a view to mislead the Court, should pay a fine to Government of 100 rupees.

And it appearing to the Court that the decrees in the suit brought by the widows against the present parties, of which suit, during the appeal, they concealed all knowledge from this Court, could not be affected by the decision passed in this Court; it was directed, that the Provincial Court, maintaining their own decree in favour of the widows for a third share, should, under the decree of this Court of September 1802, reserve to the appellant and respondent two-thirds only of the talook, giving the respondent possession of half of that portion. (a)

(a) By the rules of inheritance the widows of the second brother were entitled to a maintenance only, not a share of the estate. (*Mitacshara* on inheritance, Ch. 2, Sec. 1, § 39.) But under a deed of gift from their husband, and written acknowledgments from both the coheirs, they acquired a right thus specially conferred on them.

1803. MAHODA (Widow of GUNGAGOVIND SEIN), and BINDRABUN,
 (her *serberakar*), Appellants,
 March 14th. *versus*
 KULEANI and two others, (Daughters of the late JOOGULKISHOR
 and TARNI DIBEH,) Respondents.

Claim under a deed of gift executed by the widow of a ver Hindoo zemindar of Bengal, who died childless, for the zemindaree formerly possessed by him, which, at his death, devolved on the widow. Adjudged, that by the Hindoo law, the widow could not alien the estate, which, at her death, must pass to the husband's heirs. But the plaintiff, a collateral relative of the husband, having shown that he was the heir at law, judgment passed, on this ground, in his favour; or rather in favour of his daughters, his heirs; he having died before the suit was decided.

THIS suit was brought by Joogulkishor, father of Kuleani, &c. in August 1796, or *Srawun* of the Bengal year 1203, in the Zillah Court of Rajshahi, against Mahoda and her *serberakar*, to recover "the *kismut* Chundernighee, &c." of which the annual produce was estimated at 1,236 rupees. These lands had formed the talook of Ramdeo Surma, whose widow Rajesree, on his death without issue, succeeded to them. She died a year or two afterwards, in 1199. The plaintiff claimed under a deed of gift from her in his favour, and as her heir; setting forth in his plaint, that in the year 1200, after her death (at which time the plaintiff was sick), Gungagovind, husband of the defendant, got possession by undue means; at whose demise his wife, the defendant, succeeded to the possession. The defendant pleaded, 1st, that the deed of gift set up by the plaintiff was of no authority; 2nd, that the defendant's husband, to whom she succeeded, held the estate under an order of the Board of Revenue in his favour. The deed of gift, as produced by the plaintiff, bearing date the 11th *Bysakh* 1198, "by Rajesree, widow of Ramdeo, son of Atmaram, grandson of Bishennath, to Joogulkishor, son of Jeynteeram, grandson of Santiram," recited as follows, "I have no heirs; you are my husband's grandfather's own brother's grandson: and are the person to perform my obsequies: of my own free will I fully relinquish and give to you my talook. You henceforward have a right to give and sell; as long as I live the income of the talook is reserved for my maintenance." Subscribing witnesses proved the execution of this deed. It should be observed, that two other deeds of gift were alleged, and suits brought for the talook, in the Rajshahi Court, about the same time as the present one, against the same defendants; one by Ramsoondur Nundee, claiming under an alleged gift from Rajesree in favour of his uncle Rammohun (who had been manager of the talook on the part of Rajesree); the other by one Kalichurn. Only one of these persons, viz. Kalichurn, produced his alleged deed of gift; but as the dates of both of them were stated to be later than that in favour of the plaintiff in the present case, the Zillah Judge considered that they could not, at all events, avail against it. As to the defendant's plea of her husband's possession under an order of the Board of Revenue, a copy of that order, filed in another cause, was brought up, dated in 1200, together with the copy of a report to the Board, from the *Mal Adawlut* at Dinajpore, on which that order was founded; and it appeared from these, that the defendant's husband obtained possession as *bhogdar* or occupant: a term implying, that it was in consequence of no heir being forthcoming: but the order of the Board provided, that any one having a claim of inheritance might sue to establish it. The Zillah Judge, considering that the defendant's husband had merely possession, and not right: that the

deed of gift was proved, and valid by reason of its priority; and at the same time inferring, from a written pedigree filed on the part of the plaintiff, the relationship between the donor's husband and the donee; gave judgment for the plaintiff, under the deed of gift: which judgment the Provincial Court of Moorshedabad affirmed in appeal. 1803.
Mahoda
and Bindra-
bun, v.
Kulean and
two others

In a further appeal brought to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington) by the defendant, she insisted, 1st, that her title principally rested on a *bye-bil-wufa*, or conditional sale from Rajesree to her husband, for 501 rupees, which afterwards became absolute; and on a will of Rammohun, who was manager of the talook in Rajesree's lifetime, and kept possession after her death under a gift from her in his favour. 2nd, that Joogulkishor never had possession under the deed of gift by virtue of which he claimed; and that the written pedigree, from which his relationship to Rajesree's husband had been inferred, was not correct.

The first plea, no mention having been made in any former stage of the cause, of the circumstances which it recited, and no reason assigned why, if true, they had not been stated, was rejected as false on the face of it. After considering the second plea, with the other proceedings in the cause, the Court proposed the following question to their pundits: If Rajesree executed the deed of gift to Joogulkishor, for the talook left by her husband; and during the life of Rajesree, and after her death, did not get possession; indeed if, notwithstanding the intention expressed in the deed, that Joogulkishor should take the talook into his hands, another person, Rammohun, was manager of it; and, after Rajesree's death, remained possessed of the talook as long as he lived, without any claim being preferred on the part of Joogulkishor, is the deed of gift, under such circumstances, valid in law? and can it establish the title of Joogulkishor and his heirs to the talook which it purports to convey?—The answer of the pundits was this: If Rajesree, calling Joogulkishor her heir, made a gift, in his favour, of the talook left by her husband, such gift, in the event of there being an heir (of the husband), cannot avail. The *Shaster* declares that a gift, by a widow, of the whole estate of her husband, is invalid: but that a gift of a moderate portion of his property, made by the widow with a view to his spiritual benefit, may be valid. If Joogulkishor were the heir of Rajesree's husband, and there were no other heir, Joogulkishor at Rajesree's death would take the talook left by her husband; and, at Joogulkishor's death, it would pass to his daughters. If Joogulkishor were not the heir, and there were no heir, the talook would escheat to the ruling power. There was no sort of affinity or connexion between Rajesree and Mahodah the appellant, whose possession, devoid of right, cannot form a title.

As it appeared therefore that by law, a gift, by Rajesree, of the talook left by her husband, would not avail; and that the determination on the case depended on the question whether Joogulkishor was, or was not, next heir to the husband; the respondents were called on to bring evidence to the correctness of the genealogical table filed by them, and to the relationship between Joogul-

1803. *Mahoda and Bindra-bun, v. Kuleani* and logical table, and proved that Joogulkishor bore relationship to two others. Ramdeo as therein stated, viz. that he was grandson of the full-brother of Ramdeo's grandfather; and consequently a collateral kinsman. On the ground that Joogulkishor was heir at law to the husband of Rajesree, and therefore entitled to the talook at her death, and that after his death it passed to his daughters, the respondents, the Sudder Dewanny Adawlut affirmed the decrees passed by the Zillah and Provincial Courts in favour of the claim preferred originally by Joogulkishor; and directed, that possession of the talook should be made over to the respondents, with an account of mesne profits since the date of the Zillah decree. (a)

1803. *BEEBEE MUNWAN, Appellant,*
versus
 June 6th. *MEER NUSRUT ALI, Respondent.*

The widow of a Moohummudan declared his landed estate to have been given by him in his lifetime to a grandson, in whose favor she fabricated a deed of gift as from her husband; which deed was set aside in a suit brought by one of the other heirs against the grandson. THIS was a suit instituted by Beebee Munwan in June 1782, against Nusrut Ali, to recover certain *Ayma* and *Nuzr Durgah* lands producing annually 6,000 rupees; as being the estate of her deceased husband Aboo Turab; laying claim to this, his estate, in part satisfaction of dower settled on her at her marriage, to the amount of 555,555 rupees. It should be observed, that the defendant (the son of Aboo Turab by a woman not married to him) was in possession under a judgment of the same Court, passed in 1779, the year after Aboo Turab's death, in a cause wherein he (the defendant) sued Hosein-o-deen for the lands as heir of his father, and obtained a decree in his favour, which recited, that it had appeared that the widow, Beebee Munwan, after her husband's death, put Hosein-o-deen her grandson, into possession of the estate, under a deed of gift in his favour, purporting to be from Aboo Turab; that the deed of gift was proved to have been fabricated by the widow, after the death of Aboo Turab; and was set aside accordingly; and that Nusrut Ali was the legal heir. To the present suit on the part of the widow claiming her dower, the defendant pleaded, that she had remitted

(a) A reference to the following passages of *Jimuta Vahana* will confirm the Afterwards, correctness of the grounds on which the decision of this cause rested. (Ch. 11, at the suit Sect. 1, § 56, and Sect. 6, § 9, and summary or recapitulation, p. 225). It of the wi- has been declared by the law officers of the courts in other suits, that a widow's dow for the gift of the estate to the next heir is good in law, though she be restrained from lands, in making any other alienation of it. This opinion, though not founded on any satisfaction express passages to that effect in books of authority, seems reasonable; as such of dower, a gift is a mere relinquishment of her temporary interest, in favour of the next as being the heir. It may, however, happen, that the person who would have been entitled-estate left to take the inheritance at her decease, may be different from the one who ob- by her hus- tained it under the gift or relinquishment to him as presumptive heir: and if the band; which title be either preferable or equal, it may invalidate such gift in whole or in part.

the dower: and witnesses were called by him to prove the plea, as would appear from the zillah decree, except which all the zillah proceedings had been destroyed accidentally by fire. The decree recited, that the witnesses brought by the defendant to prove the remission of the dower, spoke only from hearsay, and did not sufficiently prove the fact: that according to an opinion given by the law officer, a claim for the dower debt was preferable to claims of inheritance; and, as the amount of the dower was greater than the value of the estate, the plaintiff was entitled to recover it. And judgment went in her favour accordingly.

The defendant appealed against this decision to the Provincial Court of Patna; objecting, 1st, that the widow, after her husband's death, did not set up any claim of dower, but brought forward a fabricated deed of gift in favour of her grandson; 2nd, that the claims set up by her were repugnant. The Provincial Court observed, that the witnesses in the former cause clearly proved, that four days after the death of Abou Turab, the widow fabricated a deed of gift in her grandson's favour, affixing to it her husband's seal; and that, though not nominally a party in that cause, she virtually was so. In answer to a question put to their law officer, as to whether, under the circumstances of the case, her claim of dower was invalidated, the Court received an opinion in these terms: as Beehee Munwan, widow of Abou Turab, declared, after her husband's demise, that he had made a gift of all his property to Hosein-o-deen before he died, there was an admission, on her part, that the property in dispute, at Abou Turab's demise, was not his: and therefore, that there was no estate of Abou Turab. The present claim, on the ground of dower debt, rests on the supposition that there was an estate. The claim is therefore repugnant; and repugnancy (*tenakuz*) is a legal bar to its validity. Under this *futwa*, the Provincial Court, considering that the claim of dower was barred by reason of the widow's having before set up the deed of gift, reversed the decree passed by the Zillah Judge in her favour.

On appeal by her from this decree to the Sudder Dewanny Adawlut, (present H. Colebrooke and J. H. Harington) it was insisted for the appellant, that there was no legal repugnancy of claim, for that, in the cause between Nusrut Ali and Hosein-o-deen, she was not a party: that the evidence there given with respect to the fabrication of the deed of gift, was not credible, and she did not admit the fact: that, if the fact were not true, the present claim could not be repugnant. On the other hand, it was insisted for the respondent, that the evidence in the former cause sufficiently proved the deed of gift to have been fabricated and set up by the appellant; with which deed of gift the present claim was incompatible.

After considering the proceedings in the cause, the Court put the following question to their law officers: if, as stated by the respondent, and as mentioned in the decree made in the cause Nusrut Ali *versus* Hosein-o-deen, the widow of Abou Turab (appellant in this cause) after her husband's death, declared a gift of the lands in question to Hosein-o-deen, the grandson; or if, without such direct declaration, Hosein-o-deen, after Abou Turab's

1803. death, with the knowledge of the appellant, took possession of the lands, on the allegation of a gift from Aboo Turab; and the appellant, without making any opposition to this, preferred no claim to dower until the judgment had been passed in favour of Nusrut Ali, as heir; in each, or either of these cases, is the appellant's claim to the lands, on account of dower, after the decree in favour of the respondent's right of inheritance, barred or not? The law officers, in answer, gave an opinion, that if the appellant, after the death of Aboo Turab her husband, did (as mentioned in the decree in the cause between Nusrut Ali and Hosein-o-deen), declare that her husband, during his life, made a gift of the lands in dispute to Hosein-o-deen, her grandson; her claim to the lands on account of dower due from her husband's estate, could not, after such declaration, be heard in law, by reason of the repugnancy. The Court considered that the widow's declaration of the gift, if such declaration were proved, might be evidence authorizing the presumption, that she had remitted her dower as pleaded by the respondent; but that the evidence on this point in the cause between Nusrut Ali and Hosein-o-deen, in which the widow was not a party, could not be taken against her. The pleaders of the respondent were therefore called on to adduce new evidence to this declaration, which they undertook to do: and their witnesses were examined by the Zillah Judge, and the depositions transmitted. It was proved by these, that the widow, after the death of her husband, caused a deed of gift for the lands in dispute, purporting to bear the seal of Aboo Turab, to be made out, in favour of Hosein-o-deen, her daughter's son; and got the attestation of witnesses affixed to it; and acknowledged and declared, that Aboo Turab, in his life-time, gave the lands to Hosein-o-deen, and empowered her (the widow) to execute a deed of gift for them; under which deed so executed Hosein-o-deen had possession of the lands, and retained it till the decree before mentioned was passed, setting aside the deed of gift, and declaring the right of Nusrut Ali, as heir.

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The law officers were again referred to by the Court, for their opinion whether, under these circumstances, the appellant's present claim on the ground of dower, was repugnant to her former declaration of the gift, so as, on that ground, to be invalid in law? To which they answered, that the widow's declaration of a gift by her husband, and acknowledgment that the whole of his property was thereby alienated, barred her claim of dower, by reason of repugnancy; because she had declared that the property in dispute was not her husband's estate; and could not now bring a claim against it as being her husband's estate. And, on a further reference to the law officers, they declared, that, notwithstanding the deed of gift had, in the former cause, been set aside; and Nusrut Ali, the respondent, now admitted that the lands in dispute were the estate of Aboo Turab, and consequently that the appellant's declaration and acknowledgment as to the deed of gift, were false: still, by reason of there not being the requisite legal refutation of the declaration made by the appellant, the *tenakuz* or repugnancy, stated in the *futwa*, was not legally done away: and the claim of dower could not be admitted.

As the deed of gift set up by Hosein-o-deen in the former cause, had been set aside by the judgment then passed in favour of Nusrut Ali, as heir to Aboo Turab's estate; and the respondent Nusrut Ali now admitted the disputed lands to be the estate of Aboo Turab, which the appellant's claim implied that they were, the Court, after considering the *futwas*, had doubts whether, by reason of the widow's former declaration of the gift, her present claim was such as to be rendered invalid on the ground taken by the law officers; and, supposing the stated repugnancy to have been, in the first instance, legally complete, whether, by the respondent's admission that the lands were the estate of Aboo Turab, and that the contrary declaration of the appellant was false, the repugnancy were not done away.

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rut Ali.

But at all events, as it was in proof that the appellant, after her husband's death, declared a gift to have been made by her husband in his life time, of his whole property, in favour of Hosein-o-deen, and caused a deed to be fabricated in his favour, and possession to be given to him; and neither then, nor at any time before the judgment was given in favour of Nusrut Ali as heir, preferred any claim on account of dower against the lands, or any other part of the estate; the Court considered these circumstances to afford sufficient ground of presumption that the appellant had remitted her dower in her husband's life-time, and relinquished all claim to it; as pleaded by the respondent. And indeed (putting out of the question the technical ground taken by the law officers), it would have been unjust that the appellant, after declaring the right of her grandson Hosein-o-deen to the estate of her husband, and fabricating a deed of gift in his favour, with a view to maintain his title, and to exclude her step-son Nusrut Ali from succession to the estate, and without ever having asserted any claim of her own on the head of dower, should now be allowed to recover the estate in satisfaction of dower-debt. On the ground that the appellant had relinquished her claim to dower, as pleaded by the respondent, and could not now maintain a claim in satisfaction of dower, the Sudder Dewanny Adawlut affirmed the decree passed against her by the Provincial Court.

1803.

Aug. 5th.

BHANOO BEEBEE, Appellant,

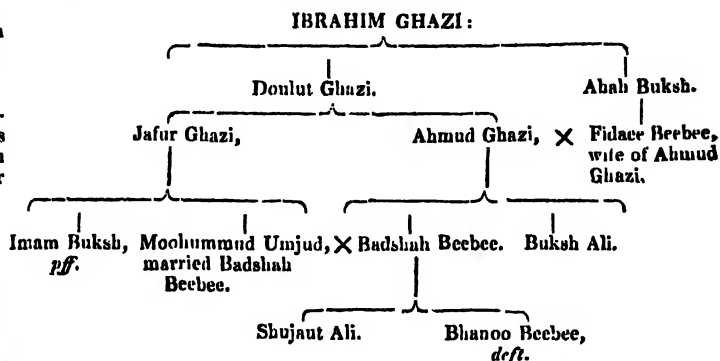
versus

IMAM BUKSH, Respondent.

Suit for lands as having been the estate of A, a Moohummudan woman who died eight years before, and to whom the plaintiff is cousin german's son. Defendant (also a relative) pleads a will from A, in favour of herself and her deceased brother. Afterwards when the will is rejected as a forgery, she pleads a title under a deed of gift from A, to the defendant her grand-daughter, and Shujaut Ali her grandson. This will, under date the 1st *Aghm* 1188, (affirmed by the plaintiff to be a forgery) recited, that Fidaee left her estate, real and personal, between the devisers abovementioned, with right of survivorship, during a term of it, to either of them; and provided, as a condition, that the zemindaree servants who attested it should always be employed.

And it should be observed, that a copy of *Koorsee-nama* or pedigree, delivered into the Collector's office in 1194, and signed by all the shareis in the zemindaree of pergunna Himunabad, five in number, and among others, by Imam Buksh, the plaintiff, (whose name was inserted for a small share) among other particulars relative to the pergunna, mentioned a deed of gift by Fidaee, in favour of her daughter Badshah Beebee, and of Moohummud Umjud, her daughter's husband, bearing date in 1174; and mentioned also a *sunrud* of possession to have been obtained, in consequence, by Moohummud Umjud; whose name was inserted for the share in question. This *Koorsee-nama*, filed on the part of the defendant, the plaintiff admitted to be authentic. The Zillah Judge, considering the will not established by evidence brought in support of it, which he did not believe, gave judgment

THIS was a suit brought by Imam Buksh in the Zillah Court of Mymensing, on the 7th of November 1789, or 4th *Katic* of the Bengal year 1196, against Bhanoo Beebee, to recover 6 anas, 5 gundas, 1 cowrie of pergunna Himunabad, stated to be the estate of Fidaee Beebee, who died in the Bengal year 1181; together with mesne profits. The plaintiff, whose claim was on the ground of the inheritance, first claimed as nephew of Fidaee's husband; then, in an amended plaint, as son of Jafur Ghazi, cousin-german of Fidaee. The following is a sketch of the family :



The defendant pleaded a right to the estate under a will which she alleged to have been made by Fidaee, leaving her property to the defendant her grand-daughter, and Shujaut Ali her grandson. This will, under date the 1st *Aghm* 1188, (affirmed by the plaintiff to be a forgery) recited, that Fidaee left her estate, real and personal, between the devisers abovementioned, with right of survivorship, during a term of it, to either of them; and provided, as a condition, that the zemindaree servants who attested it should always be employed.

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for the plaintiff, for the estate, real and personal, of Fidaee Beebee, 1803.
as her heir at law.

The Provincial Court of Dacca, in appeal, thought the will sufficiently proved, and reserved to the defendant, under it, a third of the property of Fidaee Beebee, as being all she was, by law : authorized to bequeath from the heir or heirs. The judgment of the Provincial Court was only for the real property, no personal property having been sued for.

A further appeal was brought to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington) by the defendant, insisting, that under the will, she was entitled to the whole estate of Fidaee : and the respondent, who was also dissatisfied with the above decree, insisting, on the other hand, that the will was forged. The Sudder Dewanny Adawlut were of opinion that the evidence adduced did not satisfactorily prove that the will was executed by Fidaee Beebee, as alleged by the appellant : and that from the unusual tenor of it, giving the right of survivorship, during the continuance of a farm, or mortgage, to the two devisees, by which means the heirs of either might have been excluded ; from its containing a condition for employing the zemindaree officers who attested it : from its appearing too that it was not produced during the life of Shujaut Ali, or till 1195, seven years after the death of Fidaee ; and from Shujaut Ali's having applied for and obtained a *purwanna* from the chief of Dacca, in 1189 (1782), within five months after the death of Fidaee, wherein no mention was made of the will, but of a deed of gift from Fidaee to her daughter Badshah Beebee, an instrument incompatible with the will alleged by the appellant ; there was sufficient ground to presume, that this will was fabricated by the appellant, or by her husband (Moohumud 'Tumeez) with her privity, for the purpose of depriving her father (Moohumud Umjud) of a share in the estate, which, it appeared, he had claimed as heir to his wife Badshah Beebee, and son Shujaut Ali.

From the proceedings in a suit before brought in the Zillah Court of Tipperah, by Umjud Ali against Bhanoo Beebee his daughter, it appeared, that he then sued for the estate in dispute, as heir of his wife, under the deed of gift from Fidaee in favour of Badshah Beebee ; in which suit the proceedings abated by reason of the plaintiff's death : and that Bhanoo Beebee (the appellant) then denied the deed of gift ; which now, however, in answer to questions from the Court, she affirmed to be genuine, and insisted that the respondent could not claim as Fidaee's heir, the gift being in favour of a person, from whom the succession would devolve mediately or immediately to her, the appellant. The respondent, on the other hand, not admitting the gift, affirmed that, by his signature to the *Koorsee-nama*, he merely certified his own share in the estate, without meaning to certify any thing else contained in the document. Here therefore two questions arose, 1st, whether, after signing the *Koorsee-nama*, in which was cited a deed of gift, by Fidaee, of her share of the zemindary to her daughter Badshah Beebee, and her daughter's husband Moohumud Umjud ; and after Shujaut Ali having been allowed to obtain possession, on suggestion of the gift to his mother, the respondent could be admitted

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to claim any part of the zemindaree by inheritance from Fidaee : 2nd, whether, after fabricating the will, the appellant on the other hand, could be allowed to benefit by a deed of gift which she before denied, but now alleged ; whether, under it she could take any share of the estate by inheritance from her mother, or her father ; or whether, by reason of her contradictory pleas of title derived from the will and gift, she would not be heard as an heir at all ? The Court referred these points to their law officers, with a statement of the circumstances of the case ; and with a further question, as to who, if neither party could be heard as heirs, was entitled to the estates of Fidaee, of Shujaut Ali, or of Umjud Ali.

The answers returned were as follows : 1st, To the *Koorsee-nama* given by the respondent into the collector's office, in concert with the other sharers in the zemindary, he, ostensibly, affixed his signature jointly with the rest, and certified the truth of its contents. But if these signatures of the zemindars merely went to the declaration of their individual shares, without reference to any thing else, then, by the respondent's signature being affixed, his admission of the deed of gift by Fidaee to her daughter is not implied ; and there is nothing incompatible with his claim of inheritance. But if the object of these signatures of the joint zemindars, was to specify their own shares, and also to declare the situation of other sharers, that is, to declare every thing relative to the estate, in such case, the respondent's admission of the deed of gift and of its contents, would be implied ; and this would be incompatible with his claim of inheritance : and, by reason of the repugnancy, such claim of inheritance could not be heard. In the answer filed in the Court of Appeal, the respondent's pleaders, after mentioning the deed of gift brought forward by Shujaut Ali and his father Moohummud Umjud, state, that she (the appellant) fabricated the will after Shujaut's death, to defeat the claims of his (Shujaut's) heirs : from which it would appear, that the respondent admitted the heir of Shujaut Ali (viz. the appellant) to have a right in the estate : and this is incompatible with the respondent's claim to the whole inheritance. 2nd, The appellant having first claimed under the will ; and now, after it has been pronounced a forgery, having affirmed the authenticity of the deed of gift in favour of her mother, which she before stated to be forged ; and laid claim to the property specified in that deed, of which the date is several years prior to the pretended will : the claim under the deed of gift, an instrument having reference to the life of the stated donor, is clearly at variance with the claim under the will, which has reference to the supposed testator's death ; and cannot be heard. In virtue of the gift, therefore, the appellant can take nothing, as heir to her father or mother. 3rd, It appearing that the zemindaree was originally the estate of Ahmud Ghazi : that his son Buksh Ali possessed it after him, and made some addition to it, by purchase : that, after him, Fidaee Beebee possessed it, as stated in the zillah proceedings by the respondent : who, in the Provincial Court of Appeal, admitted Shujaut Ali to have a right in the estate : the estate should be divided according to the rules of legal distribution : the appellant will get nearly half of it, falling to her from her mother, her father, and her brother : the respon-

dent will get the rest, by inheritance from Fidaee Beebee. The partition will be thus: viz. the whole being divided into 432 parts; or into 72 parts, a sixth of the above; or into 24, a third of 72: then of 24 parts, the estate of Ahmud Ghazi, 3 parts (an eighth) fall, at his death, to his widow Fidaee: and of the residue, 14 go to Buksh Ali his son, and 7 to his daughter Badshah Beebee: his brothers, Jafur Ghazi and Mahtab Ghazi, get nothing. On Buksh Ali's death, his estate being divided into 6 parts, 2 (a third) go to his mother Fidaee Beebee: 3 (a moiety) to his sister Badshah Beebee: 1 (the residue) to his paternal uncle Jafur Ghazi. On Badshah Beebee's death, her estate being divided into 36 parts, her husband Moohummud Umjud gets 9 (a fourth): her mother Fidaee 6 (a sixth): and of the residue, her son Shujaut Ali takes 14, and her daughter Bhanoo Beebee 7. On Fidaee's death, her cousin Jafur Ali (i. e. son of the brother of her father) gets her estate, in preference to Bhanoo Beebee, daughter's daughter, and Shujaut Ali, daughter's son (a). On the death of Shujaut Ali, his estate goes to his father Moohummud Umjud; to the exclusion of Bhanoo Beebee, his sister (b). On Jafur Ghazi's death, his son Imam Buksh gets his estate. On the death of Moohummud Umjud, leaving one daughter, Bhanoo Beebee, she gets the whole of his estate. Thus there are surviving, of the family, two persons, Bhanoo Beebee, and Imam Buksh: and of 432 shares, Bhanoo Beebee will get 210: Imam Buksh 222: or, resolving the whole into 72 parts, the former will get 25, the latter 37.

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Objections were urged by the appellant against that part of the above distribution which allotted to the respondent's father a sixth share of the estate of Buksh Ali: and the Court, considering that Buksh Ali died in 1174, 22 years before the date of this suit; that, in that period of 22 years, no claim of inheritance had been made to his estate, by the respondent or his father; that the respondent now claimed the estate of Fidaee, and not of Buksh Ali; and that a claim to Buksh Ali's estate would at all events be now barred by the lapse of time, under the existing rules of limitation, determined, that the sixth share of Buksh Ali's estate, allotted by the *futwa* to the respondent's father, must be transferred to the other heirs of Buksh Ali in the legal proportions; according to which, 21 shares of 432 being deducted from the respondent's portion, would be added to that of the appellant: making the appellant's share 231 of 432; and the respondent's 201. This, therefore, supposing the estate to be distributed without reference to either the will or deed of gift, was determined to be the right distribution. That the will was a forgery, was already decided; and the Court determined, in conformity with the opinion of their law officers, that the appellant, after setting up the will, could not be admitted to plead a title derived from the deed of gift, of which she before denied the authenticity. That the respondent, by signing the *Koorsee-nama* with the other sharers, admitted the gift from Fidaee to Badshah Beebee, and therefore could not now be heard

(a) Any male in whose line of relation to the deceased no female enters, is residuary, and succeeds as such preferably to any distant kindred. *Sirajiyah*, p. 10 and 28.

(b) Sisters are excluded by the father. *Sirajiyah*, p. 8 and 13.

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against it, or allowed to claim as heir of Fidaee, was not clear to the Court: and there appeared sufficient ground to infer, that (as alleged by the respondent) he knew nothing of the deed of gift, and that his signature to the document was merely to certify his individual share, and nothing else: for had he intended to certify the gift, he would in all probability not have certified it as a gift from Fidaee to Badshah Beebee and Moohummud Umjud (in which way the *Koorsee-nama* mentioned it), when Moohummud Umjud's name was not mentioned at all in the deed. Besides, at that time, neither the appellant nor any one else had questioned the deed of gift set up by Moohummud Umjud, the appellant's father; and supposing that the respondent, then thinking it authentic, did not question it; yet, since the appellant afterwards, in a dispute with his father, set up a pretended will of Fidaee, and denied the deed of gift to be genuine; the appellant could not now with any justice object to the respondent's denial of the same fact. If therefore the decision on the case were to depend on the admissions of the parties, the whole of the lands in question, which the appellant admitted to have been long the property of Fidaee, would be adjudged to the respondent as her heir. But as it did not appear from the proceedings that Fidaee held only in her own right; but that parts of the lands were bought in the name of her son Buksh Ali, and also of Ahmud Ghazi; and it was presumable that all of them were either the estate of Ahmud Ghazi, or purchased by means of assets of his estate; it appeared proper to the Court to consider Fidaee as having held on the part of all the joint heirs of Ahmud Ghazi; and to divide the property accordingly, in conformity with the *futwa*, maintaining the respondent's right of inheritance from Fidaee; and the appellant's right of inheritance from her mother and father.

Judgment was therefore given by the Sudder Dewanny Adawlut, reversing the decision of the Provincial Court, and directing, that, of the lands in question, 201 parts of 432, should be given into possession of the respondent, with an account for mesne profits since the date of the suit; deducting therefrom the debts of Fidaee, provided her personal property (which the present suit did not comprehend) should not have been sufficient to cover them. Costs in all the Courts were made payable by the parties equally. (c)

(c) The doctrine of Moohummudan law, respecting repugnant claims and inconsistent declarations or acknowledgments, is explained in this and in the preceding and following cases.

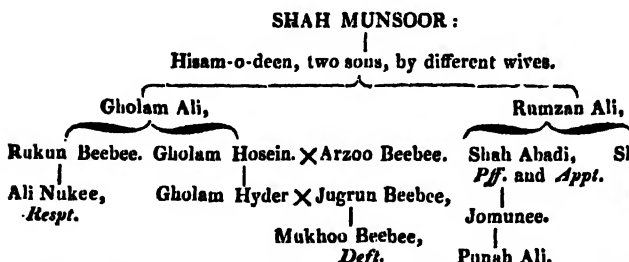
The distribution of shares according to the law, in so many instances of succession to vested interests (*Sirajiyyah*, p. 27.) as occurred in this case, affords a comprehensive example of the Moohummudan rules of inheritance.

SHAH ABADEE, (pauper), Appellant,
versus
SHAH ALI NUKEE, Respondent.

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Oct. 12th.

THIS action was brought by Shah Abadee in the Zillah Court Plaintiff, a of Burdwan, in June 1789, against Mukhoo Beebee (joined with her distant col- husband Munour Ali,) to recover the estate, real and personal, lateral by the half left by Shah Gholam Hyder, who died a year or two preceding. blood, The following genealogical sketch will tend to elucidate the case : claims the estate of a deceased Moolum-mudan from defendant, who pleads a gift to her own mother from the deceased in liquidation of dower. Plaintiff denies the marriage of defendant's mother with the deceased, and her being daughter of the deceased : but on the defendant's death during the suit retracts his denial, and claims as her heir. The Moolum-mudan law officers declare another claimant, viz. the maternal grandmother of the deceased, to be heir to the whole of the estate. The plaintiff first denied that the defendant was the daughter of



The plaintiff claimed the estate by right of inheritance, as being nephew to the grandfather of Gholam Hyder. The defendant pleaded, that Gholam Hyder made over the whole of his estate, except an eighth, the portion of Arzoo Beebee his mother, to Jugrun Beebee his wife, in satisfaction of dower : that Jugrun had the possession ; and died, leaving her daughter, Mukhoo Beebee, heir to her property : that Arzoo Beebee made a gift of her property to Mukhoo Beebee : who was, therefore, in rightful possession of the estate. The plaintiff, in his reply, contradicted the above statement ; and affirmed, that Mukhoo was not the daughter of Gholam Hyder, but of one Peer Moolummud : and that Jugrun, the defendant's mother, was never married. Evidence was brought on both sides. Witnesses for the defendant proved, as stated in the foregoing sketch, that Mukhoo was the daughter of Gholam Ali by Jugrun, his wife. And from documents brought forward by the defendant, viz. 1st, a deed of *hibeh-bil-iwuz* from Gholam Hyder to Jugrun his wife, settling on her certain parts of his property in lieu of half her dower ; 2nd, a similar deed for the rest of his property, in lieu of the other half ; 3rd, a deed of gift by Arzoo, mother of Gholam Hyder, to Mukhoo, for her property : to the execution of which three deeds the defendant adduced proof ; the Zillah Judge, considering that the defendant Mukhoo Beebee was rightfully in possession, dismissed the plaintiff's claim. And the Provincial Court of Calcutta, on appeal to them by the plaintiff, affirmed the dismissal, reciting in their decree, that the documents of the defendant appeared to them to be proved ; and that, supposing them not proved ; the defendant, as daughter, was heir to the estate.

A further appeal was brought to the Sudder Dewanny Adawlut : in which, the two original defendants having died, Shah Ali Nukee (sister's son to the father of Gholam Hyder) defended the appeal. From the pleadings of the parties in the appeal, it appeared, that

1803. the appellant now admitted the parentage of Mukhoo Beebee, and her right to the estate; and stated himself to be her heir: declaring that, before, he thought Mukhoo Beebee was not the daughter of Gholam Hyder; but that, as she, denying herself to be the daughter of Peer Moohummud, had shown that she was the daughter of Gholam Hyder; and the fact had been, by two judgments, pronounced established; he now knew that she was really the daughter of Gholam Hyder; and that he, the appellant, was a residuary heir of Mukhoo Beebee, and, as such, entitled to the estate. The respondent, on the other hand, who was daughter's son to Gholam Ali, the great-grandfather of Mukhoo Beebee, and, as such, stated himself to be heir to Mukhoo Beebee, contended, that the ground now taken by the appellant, viz. of being heir to Mukhoo Beebee, on the admission that she was the daughter of Gholam Hyder, was incompatible with his former denial of that fact, and his declaration that she was the daughter of Peer Moohummud; and was inadmissible in law, by reason of the repugnancy. And the respondent further contended, that Punah Ali, grandson of the appellant, had been concerned in the death of Mukhoo Beebee, and on trial for the murder, had been sentenced on violent presumption (*shoobah-i-shudeed*) to imprisonment for a term of years: wherefore all right of inheritance from Mukhoo Beebee, either by Punah Ali, or the appellant, was barred in law.

And it should be observed, that there were other claimants to the estate of Mukhoo Beebee, viz. 1st, Busunt Beebee, calling herself maternal grandmother; 2nd, Noorun Beebee, calling herself maternal aunt; 3rd, Lal Beebee (in behalf of her son, Syud Moohummud Ali) stating him to be grandson of Shah Sadee, the appellant's brother.

The Sudder Dewanny Adawlut delivered the proceedings in the cause to their law officers, who were directed to consider them, and, on the supposition that these persons bore the relationship stated, to declare, who was entitled by law to be heir to the estate of Mukhoo Beebee. The answer returned was this; "It appears that Shah Abadi, the appellant, in the life-time of Mukhoo Beebee, denied that she was the daughter of Gholam Hyder; and after her death, with the view to get her estate, claims as residuary heir to her. This claim, being a claim to property under a declaration of her birth, contrary to what was before alleged, cannot be heard in law by reason of *tenakuz* or repugnancy. The *Fusool-ul-usteroshee*, (a treatise on Moohummudan law) gives the following case: A. made a claim on B. for maintenance, alleging that B. was his brother: to which B. pleaded that A. was not his brother. A. afterwards died; and B. preferred a claim, as brother, to inherit A.'s estate. B.'s claim shall not be admitted; for this is not an acknowledgment of A.'s birth, such as to preclude *tenakuz*, or repugnancy, from being a legal bar to B.; it is strictly a claim to property, inconsistent with a former assertion. Besides, the appellant, not content with denying that Mukhoo Beebee was the daughter of Gholam Hyder, declared her to be the daughter of another man; and attempted to prove it. Such declaration must stand good against the declarer. Indeed, had the father of Mukhoo Beebee made a similar declaration, that is, declared her to be

the daughter of Peer Moohummud, this would have stood good against him; and he could not afterwards have claimed succession to her estate. The Zillah and Provincial Courts having grounded their judgment in favour of Mukhoo Beebee on the validity of the gift, and not on inheritance, the appellant's denial of the parentage of Mukhoo Beebee, has not been legally refuted. The appellant, moreover, after appealing against the decrees of the lower Courts, has, in the Sudder Dewanny Adawlut, as well as before, denied Mukhoo Beebee to be the daughter of Gholam Hyder, as appears from a passage in his pleas of appeal, which recites, that Gholam Hyder died without issue, and Mukhoo Beebee took wrongful possession of his estate. After this denial of the fact in the Sudder Dewanny Adawlut, his claim to the estate cannot be admitted, by reason of the repugnancy. Punah Ali, though he be grandson of Shah Abadi, has no claim of inheritance to Mukhoo Beebee's estate: but if he establish the gift, his claim to the estate in virtue of it may be maintained; presumptive proof of homicide will not invalidate this claim. Mehr Ali, grandson of Shah Sadee, brother of the appellant (the appellant being a nearer residuary heir), has no claim of inheritance from Mukhoo Beebee. If Busunt Beebee be, as she states herself, the maternal grandmother of Mukhoo Beebee, and there be no intermediate heir, she will take the whole estate by inheritance (*furzann-o-ruddun*), as being entitled to her specific share, and to the return for the surplus. Noorun Beebee, the maternal aunt, being of the distant kindred (*zoo'-il-'erham*), cannot inherit any part of the estate while there is a specific sharer. And though the respondent is of the distant kindred, yet as from some of the proceedings it appears that he has a claim to the estate under a gift from Busunt Beebee, if Busunt Beebee's right of succession be established, and her gift of the estate in his favour be proved, he (the respondent) will have the right to it."

After considering this *futwa*, by which it appeared that the appellant's claim of inheritance was not admissible, and that Busunt Beebee apparently was the heir, the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington) affirmed the decrees of the Zillah and Provincial Courts. (a)

(a) The opinions delivered by the law officers in this and the preceding cases, elucidate the maxims of Moolhummudan law concerning inconsistency of claims and of declarations.

Homicide, whether punishable by retaliation or expiable, is an impediment to succession to the estate of the person slain. This position will be found in the *Sirajiyyah* (p. 2), and more distinctly stated in the *Hedaya* (vol. 4, p. 273, 275, 276.)

The grandmother was entitled to the specific share of a sixth, and to the residue of the estate by return to her (for want of any admissible claimants as residuaries) in preference to all distant kindred; who are those in whose line of relation to the deceased a female enters. *Sirajiyyah* (p. 8, 21, 10, and 28.)

1803.

Shah Abadee, v. Shah Ali Nukee.

1803.

SHEOPERSHAD SING, Appellant,

versus

Sept. 5th.

KULUNDER SING, Respondent.

Plaintiff and defendant were till lately in family partnership, defendant managing the zemindary, and plaintiff receiving his expenses. The family estate consisted originally of 12 mouzas, and the manager acquired 12 more for 3,200 rupees, borrowed for the purpose; and afterwards took out a zemindary pottah, for the whole together. Held, in conformity with an opinion of the pundits, that the plaintiff, at separation, was entitled to half of the whole: for the acquisition by the managing partner is for common benefit, and the money, borrowed for the purpose, is payable by each sharer, in proportion.

IN September 1798, or *Bhadon* of the *Fusslee* year 1205, Kulunder Sing sued Sheopershad Sing in the Zillah Court of Juaupore, for the zemindaree right of a moiety of the talook Jughuan, consisting of twenty-nine mouzas, and assessed at a *jumma* of 19,001 rupees. It would appear that the family of the parties was this:

DUREAO SING:



The plaintiff claimed on the ground that the talook was the joint property of himself and the defendant; who, till 1201 (with a third partner who died without issue) lived together in family partnership (the defendant managing the estate), and then, disagreeing, they separated.

The Zillah Judge made a decree for the plaintiff, for the moiety claimed, on the ground of its appearing to him from the evidence in the case, that in 1201, when the parties separated, they were coparceners, and had a joint right in the estate. This decree the Provincial Court of Benares affirmed in appeal: at the same time adjudging interest to the plaintiff on the valuation of the lands claimed, from the date of the zillah decree.

A further appeal was brought to the Sudder Dewanny Adawlut by the defendant, objecting, principally, that no law opinion had been taken on the case, and that due attention had not been paid to the mode in which the mouzas had been acquired; in none of which, excepting four, the respondent could have any joint right.

The Court decided as follows on the facts and law of the case. From the proceedings held, it appeared that the appellant was the son of Doon Sing, eldest son of Dureao Sing, and that the respondent was son of Buljoor Sing, second son of the same Dureao Sing. After the death of Dureao Sing and Buljoor Sing, the appellant and respondent were in family partnership, till the *Fusslee* year 1201: and the appellant, being of the elder branch of the family, was manager of the talook in question; the respondent receiving from it a maintenance, and necessary expenses. Of the twenty-nine mouzas, four were admitted by the appellant to be the hereditary estate left by Dureao Sing, and a moiety of them therefore to be the right of the respondent. The appellant insisted, that eight of the mouzas were the estate of one Nihal Sing: that Nihal Sing adopted his (the appellant's) father and made him his heir: wherefore the respondent could have no joint right in these. The respondent, on the other hand, affirmed, that on the death of Nihal Sing without issue, Dureao Sing, his collateral relative, succeeded to the eight mouzas as heir: and objected,

that, if the appellant's father had been adopted by Nihal Sing, he could not have taken any part of Dureao Sing's estate as his son. As the fact of Nihal Sing's having made the appellant's father his heir, was not proved; and from the evidence of Nonidh Rai, *serishtadar* of the pergunna (a witness called by the respondent in the Zillah Court, and approved by the appellant) it appeared that these eight mouzas, for 40 years before the death of Dureao Sing, appertained to his zemindaree; and the appellant's plea of his father being adopted heir to Nihal Sing, was, at all events, invalidated by his father's claim, and possession, as heir of Dureao Sing: the Court considered his plea respecting the eight mouzas to be invalid; and that it was established that the respondent had a joint interest in them. With respect to the remaining seventeen mouzas, the appellant pleaded, that the zemindaree right of them was acquired by him, from the Raja of Benares, on his paying the sum of 3,200 rupees, balance of revenue due from the former zemindar, which sum he borrowed for the purpose; wherefore the respondent could have no right of participation: and further stated, that the zemindaree *perwannas* were in his own name exclusively; but the *perwannas* not having been produced, this was not in evidence. By the testimony of Nonidh Rai it was shewn, that the seventeen mouzas were given into the appellant's possession by the Raja of Benares, fifteen years before the institution of this suit, but after the decease of Doon Sing, the appellant's father; of Buljoor Sing, the respondent's father; and of Ahlad Sing, Dureao Sing's third son: and that, since the demise of those persons, the respondent had been in family partnership with the appellant and Sikhnedhan Sing, son of Ahlad Sing, until the end of 1201, when the respondent, and Sikhnedhan, separated from the appellant, and claimed separate shares of the zemindaree: that after this, Sikhnedhan died, without issue. And it further appeared, that at the settlement of the Benares province in 1198, a zemindaree *potta* for the whole of the twenty-nine mouzas, together, was obtained by the appellant from the Resident at Benares, in his own name.

Under these circumstances, and considering the mode in which these seventeen mouzas were acquired, the Court proposed a question to their pundits, to ascertain whether the seventeen mouzas were in law to be considered the joint property of the appellant and respondent, or whether they were the exclusive property of the appellant; and whether, if they were joint property, the parties would share them equally, or not. The following was the answer given: " Since after the demise of Dureao Sing and the others, the appellant and respondent were till 1201 in family partnership without separation, the latter receiving maintenance from the zemindaree (of which the original hereditary part was twelve mouzas), and the appellant, as being of the eldest branch, having the management; and since the manager, by payment of 3,200 rupees, obtained a zemindaree grant of seventeen mouzas in his own name; and, at the general settlement, obtained a zemindaree *potta* for the whole twenty-nine mouzas, together, in his own name; the legal conclusion is, that he annexed the seventeen additional mouzas to the former twelve, and increased the joint zemindaree.

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From the manager's having borrowed 3,200 rupees, with which he obtained the zemindaree of the seventeen mouzas, the joint interest of the respondent in this acquisition is not invalidated: for the manager in a joint estate has the control of all money transactions. Of the whole twenty-nine mouzas, the respondent will take an equal share with the appellant. If the lenders of the money with which the seventeen additional mouzas were acquired, have not been repaid, the sharers will make repayment, each in his proportion. This opinion is conformable to the authority of the *Mitacshara*, and the custom of the province."

As it appeared from this opinion, that the seventeen mouzas were, in law, as well as the other twelve, the joint right of the parties; and that the claimant was entitled to a moiety of the whole; the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington) affirmed the decrees of the Zillah and Provincial Courts, with the exception that, instead of the interest erroneously adjudged by the latter Court, the appellant should render an account to the respondent of the mesne profits accruing on the moiety adjudged, from the beginning of the *Fusslee* year 1210, (in which the zillah decree was given) until possession should be obtained under the final judgment. (a)

1804.

BEEBEE JUGUN, Appellant,

versus

May 7th.

BAKIR ALI and others, (Heirs of YOUSUF ALI KHAN),
Respondents.

Suit by the daughter of an *ayma-dar*, against the son, for a share of an *ayma* mouza, as heir; to which the son pleads that the mouza fell to the mother in payment of dower, and that she conveyed it to him. The plea not being substantiated, the Sudder Dewanny Adawlut adjudge to the plaintiff

IN January 1794, or *Poos* of the *Fusslee* year 1201, Beebee Jugun sued Yoosuf Ali Khan in the Zillah Court of Sarun for 1,996 rupees, as a third of the produce during five years, of the mouza Godna, consisting of *ayma* land, exempt from revenue, in pergunna Manghee; and for possession of a third share of the mouza.

The plaintiff and defendant were daughter and son of Sheer Afgun Khan, by Noorun his wife; which Sheer Afgun Khan, stated to have been proprietor of the *ayma* mouza in question, died about the *Fusslee* year 1150. The plaintiff claimed on the ground that she was heir to a third of the mouza; the rest of it falling to the other heirs, viz. the defendant and Noorun the widow. The sum demanded by her as produce of the third share for five years,

(a) The subject of acquisitions liable or not liable to be shared, is treated in the *Mitacshara* (C. 2, on inheritance, Sec. 4.) The lands in dispute having been obtained for a payment of money not furnished out of his own separate funds by the appellant; and having been included, at the appellant's instance, in the same *sunnud* with the hereditary estate, in which the respondent's right of participation was undoubted, were clearly acquisitions made for the benefit of coparceners, and at their charge, under the management of the appellant, acting as manager for the whole. Had they, on the contrary, been acquired from separate funds, and held distinct from the patrimonial estate, they would have belonged exclusively to the acquirer, and not been subject to be shared with him by his co heirs.

ending with 1201, was the balance of it after deducting 12 rupees per month, which she stated herself to have received from Noorun the widow, while she lived; and afterwards from the defendant. The defendant admitted, in his answer, that the mouza was the property of Sheer Afgun Khan, but pleaded that Noorun his mother took the whole in satisfaction of her dower debt, and mortgaged it with conditional sale to him the defendant; which conditional sale became absolute: that he had since (for a period of 47 years) held the mouza: that the monthly allowance to the plaintiff was voluntary on his part, and no right could be inferred from it. In support of his pleas, the defendant filed, 1st, a deed of *bye-bil-wufa*, by Noorun Beebee to Yoosuf Ali Khan, dated *Rujub* 11, 1149 *Hijera*, corresponding with 1154 *Fusslee*, reciting, that the mouza Godna was her property, in right of dower due to her; that she mortgaged it to Yoosuf Ali Khan for the sum of 2,001 rupees, received through him from bankers, and engaged to repay them the money within two years, in default of which the conditional sale should become absolute to Yoosuf Ali Khan, and he should enter on possession: 2nd, an *ikrarnama* by Noorun Beebee to Yoosuf Ali, setting forth reasons for borrowing the money, and the circumstances of the *bye-bil-wufa* executed to Yoosuf Ali: dated 16th *Jumadossani*, 1154 *Fusslee*, with 1149, as the corresponding *Hijera* year. The Zillah Judge put a question to his law officer, as to whether, supposing a Moohummudan to die indebted to his wife for dower, and to leave landed property of which the value was less than the dower due, the widow was to take the estate to the exclusion of heirs: whether she could execute a deed of *bye-bil-wufa* on it: and whether, supposing the *cazee* whose seal was affixed to a deed, and all the attesting witnesses to be dead (as appeared to be the case with respect to both the instruments abovementioned), such deed could be considered valid. To this the law officer answered, that the widow, under such circumstances, might do what she pleased with the property: that a deed attested by a *cazee* and witnesses now dead, was not therefore invalid: but that, if there were no witnesses, the party producing it might be sworn. The Zillah Judge, receiving these deeds of the defendant as valid, apparently without further enquiry; and considering that the mouza had been legally conveyed from Noorun to the defendant, and held by him accordingly; gave judgment, dismissing the claim.

The plaintiff appealed against this judgment to the Provincial Court of Patna, chiefly insisting, that the deeds had not been proved. The Court called on the defendant to know whether he had any proof: in answer to which, he alleged uninterrupted possession for 25 years, since the sale; and offered to make oath. The Court, observing that he appeared to have had invariable possession, resolved to swear him; and he made oath, that his mother sold him the mouza for 2,001 rupees. On this the zillah decree was affirmed.

A further appeal was brought to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington) by the plaintiff, on whose part it was contended, that there was no proof of the property of Sheer Afgun Khan having been absorbed in the dower

1804.
her share of the land, on a division of it according to the Moohummudan law of inheritance. But the decree is afterwards amended, the parties having represented the land (not in possession of either of them) to be held by other persons in mortgage, whereas the alleged mortgagees, when called upon, state themselves to hold as proprietors, paying a fixed *jumma* to the *ay-madar's* heirs. The Sudder Dewanny Adawlut therefore adjudge a share of the *jumma* receivable, and not of the land, leaving the claimant, who objects to the asserted tenure of the possessors, to sue them if he think fit.
Opinion given by the law officers, that a deed, termed a deed of

1804. debt of Noorun his widow, nor any sufficient proof of her having conveyed the mouza to Yoosuf Ali: that *bye-bil-wufa* moreover, was not a legal contract. For the respondent, on the other hand, (who had now succeeded to the original defendant) it was contended, that the *bye-bil-wufa* was legal: that, if the attesting witnesses were dead, a deed bearing the *cazie's* seal, under which long possession had been held, required no proof.

bye-bil-wufa, executed on land for a sum of money, in favour of a person through whom, not from whom, the money was borrowed, is not valid in Moohumudan law.

On examination of the two deeds filed by the defendant in the Zillah Court, it was observed by the Sudder Dewanny Adawlut, that the *Hijera* and *Fusslee* dates, annexed to them as corresponding, did not agree, for the 16th of *Jumadossani* and 11th *Rujub* of the *Fusslee* year 1154, correspond with dates in the *Hijera* year 1160, and not in 1149; and the dates of the *Hijera* year 1149, given in the deeds, correspond with the *Fusslee* year 1144. And besides, the *ikrarnama* dated in *Jumadossani*, mentioned the prior execution of the *bye-bil-wufa*; whereas this deed was of a later date than the other. The *vakeel* of the respondents, called on by the Court for an explanation of these circumstances, had none to offer. He was then asked for the *Mehr-namu*, or deed of dower, alleged to have been executed by Sheer Afgun Khan in favour of Noorun; and answered that he would ascertain whether his clients had it. It was then observed to him, that the *vakeel* of the defendant in the Zillah Court, had stated that the defendant had possessed the mouza uninterruptedly for 47 years; that, afterwards, the defendant had stated to the Provincial Court, he had possessed it 25 years: the *vakeel* therefore was asked the reason of this inconsistency, and what was the real term during which the person, of whom his clients were heirs, had possessed the mouza? To this the *vakeel* answered, that he had understood Yoosuf Ali was absent for several years, after the term of the *bye-bil-wufa* expired: that he could not, without reference to his clients, state the period of possession; but so far he knew, that Yoosuf Ali mortgaged the mouza to one Tegh Ali Khan, after whose death his sons succeeded to his interest in the mortgaged property. The *vakeel* of the appellant, being questioned whether there was any deed of dower in favour of Noorun from her husband, replied that he was not informed; but contended that, whether there were or not, the mouza was not absorbed in her debt of dower, and did not fall to her in satisfaction of it.

Under these circumstances, the Court, adverting to there being no proof adduced to the deeds filed by the original defendant, and to the plea of the appellant, that the deed of *bye-bil-wufa* was no legal conveyance of the property, gave the papers of the cause into the hands of their law officers, and proposed this question to them: Notwithstanding the inconsistency of dates, and contents, in the deeds of *ikrarnamu* and *bye-bil-wufa*, of the witnesses to which none are living; and the inconsistency of the statements on the part of Yoosuf Ali as to the period of his possession of the mouza; will these deeds, in the event of proof being brought to Yoosuf Ali's possession for 25 years, be legally valid and sufficient, or not, without other corroboration than the oath of Yoosuf Ali, to prove the conveyance of the mouza to him? And if they be not of any effect, and Sheer Afgun Khan, former

proprietor of the mouza, died leaving heirs (as stated by the respondent's pleader) three widows, a son, and a daughter : and the fact, alleged by the respondents, and denied by the appellant, of the mouza in question having fallen to the widow Noorun, in satisfaction of dower due to her, be not proved ; how will the mouza be divided in law among the heirs of Sheer Afgan Khan ? and in the event of Noorun's right to it being proved, what will be the partition of it between her son and daughter ?

1804.

Beebee Jugun, v. Bakir Ali and others.

The answer returned was this : the *ikrarnama* and *byenama*, on which the defendants rest their title, will not avail them. These are documents in the hands of an adversary ; not preserved among the *cazee's* records ; the plaintiff does not admit them ; proof is not brought to them ; and the plaintiff has not declined to make oath against them ; which, had it been the case, might have been taken as an admission. The disagreement of date between the *Hijera* and *Fusslee* years : the fact of the *byenama* being posterior in date to the *ikrarnama*, though this latter recite it ; and the inconsistent statements as to the period of Yoosuf Ali's possession : form presumptive proof that the documents are not genuine. And putting out of the question the fact of their authenticity, the deed purporting to convey the mouza is invalid in point of law ; for the purport of it is, that Noorun Beebee borrowed 2,001 rupees, on interest, from bankers, for two years, through Yoosuf Ali, and executed the deed of *bye-bil-wufa*, engaging, that on repayment of the money, with interest, within the term, through Yoosuf Ali, she should cancel the deed ; but that otherwise an absolute sale should take place. This therefore is not a deed of sale ; and *bye-bil-wufa*, which some hold to be a contract admissible in Moohummudan law, cannot be thus constituted. Length of possession on the part of Yoosuf Ali, and his oath, form no proof. And the allegation of the defendant as to the possession of Noorun in satisfaction of dower debt, has not been proved. The mouza therefore is the estate of Sheer Afgan Khan, divisible among his heirs. If (as has been stated by the respondents) he left (besides Yoosuf Ali, a son ; Jugun Beebee, a daughter ; and Noorun Beebee, his first widow) two other widows, viz. Lal Beebee, and Ruhmut Beebee ; then the mouza, his estate, will be divided into twenty-four parts ; of which three, or an eighth, will go to the widows ; fourteen to the son ; and seven to the daughter. If there were only one widow, Noorun, the whole eight will go to her. And on the death of Noorun, leaving heirs, Yoosuf Ali, a son, and Jugun Beebee, two-thirds of her estate would go to the son, and one-third to the daughter.

A question being put to the *vakeel* of the respondent respecting *mehrnama* required by the Court, it did not appear that any such document was forthcoming. The Court, according to their opinion on the case, and the *futwa* of their law officers, decreed partition as there specified, among the heirs of Sheer Afgan Khan, viz. the son and daughter and three widows : two-thirds of the share of Noorun and also of the share of Ruhmut (who it was found died childless, leaving heirs Yoosuf Ali, and Jugun Beebee), falling to Yoosuf Ali, and, in his right, to his heirs the respondents ; and one-third of each to the appellant. So that the share decreed to the

1804. appellant was seven parts of twenty-four, and a third of two other several parts; and to the respondents fourteen parts, and two-thirds of two other several parts. But as the Court were informed that Yoosuf Ali Khan mortgaged the mouza to one Togh Ali Khan, and that Shahamut Ali and Gholam Nujuf Khan, sons of the mortgagee, were now in possession; it was directed, that the Zillah Judge should enquire into and report the circumstances of the mortgage; after calling on the heirs of Togh Ali to state what sums had been received in satisfaction of it; and to shew cause why possession of the lands should not be awarded under the present decree.

Beebee Jugun, v. Bakir Ali and others.

On the 30th of November 1804, the Sudder Dewanny Adawlut had before them the return made from the Zillah Court, together with petitions on the part of the sons of Togh Ali Khan, setting forth, that they were *malikan mokurreeedar* proprietors of the mouza, holding under the *aymudars* at a *mokurreee*, or fixed *jumma* of 1,606 rupees; which they stated to have been regularly paid to Sheer Afgan Khan, to Yoosuf Ali Khan, and to his heirs or assignees; and at the same time these persons produced engagements entered into by their father and themselves with Yoosuf Ali, tending to shew that they were proprietors; and the last of them stipulating an hereditary *mokurreee jumma*. The Court, finding they had been misinformed with respect to the tenure (real or alleged) of the persons in possession, amended their decree; and, instead of shares of the mouza, adjudged to the claimant shares of the *jumma* receivable from the persons holding under the heirs of the *aymudar*; with directions for the respondents refunding to the appellant the arrears of her portion since the date on which the suit commenced.

The appellant afterwards prayed to be put into possession of a share of the land, instead of a portion of the *jumma*, and to oust the possessors, on the ground that their alleged *mokurreee* tenure was invalid; which question the Court refused to go into; leaving the appellant to contest the validity of the tenure in a separate suit, if she thought proper. (a)

(a) According to the maxims of Moolhummudan law, the respondent, or person denying the claim, may be required to make oath to the denial, and the refusal to do so is a confession of the demand. (*Hedaya*, vol. 3, p. 68 and 70). In this case, the person who defended the action, setting up a claim founded on certain documents exhibited by him, was not respondent, but claimant; and the oath could not properly be tendered to him, but to the other party; and for this reason the law officer's remark, that the plaintiff in the action, (who denied that claim, and the documents exhibited in support of it) had not declined to make oath.

On the subject of sale, with an option of rescission within a limited time, or *bye-bil-wufo* considered as a mortgage, which some deem lawful, and others not, see observations on No. 31; and the *Hedaya*, vol. 2, p. 381.

It is necessary to the completion and validity of a sale, that the declaration and acceptance of the parties respectively, should be couched in terms expressive of a past, not a future act. (*Hedaya*, vol. 2, p. 36.) This was not the case in the alleged *bye-bil-wufo*: which moreover was a sale to one person for a consideration received from another, being for money borrowed not from the party, but through him.

On the rules of distribution of inheritance applicable to the case, see *Sirajiy-yah*, p. 5.

ALI BUKSH KHAN, (for himself and on the part of KADIR
BUKSH KHAN, and HOSEIN BUKSH KHAN), Appellant,

1804.

versus

Aug. 24th.

KAEEM BEEBEE, (pauper), Respondent.

THIS was a suit brought in the Zillah Court of Behar, in Judgment October 1800, corresponding with *Asin* of the *Fusslee* year 1208, for the daughter of in which Kaem Beebee was plaintiff, against Ali Buksh, Kadir Buksh, and Hosein Buksh, defendants. The claim was for 37,500 Moohum-rupees. The plaintiff was daughter of the late Raja Hosein modan, a Buksh Khan, zemindar of Shehrghatee, by Omda Beebee his wife, against the male relatives in possession of the estate, was the son, and the two other grandsons of the late Raja. The plaintiff claimed the sum in question as one of the heirs of her mother, setting forth in her complaint, that the sum of 75,000 rupees was settled by the late Raja on her mother, as marriage dower, and at his death was a debt against his estate; which debt he acknowledged before he died; wherefore the plaintiff, as heir to half of it, brought the present suit; reciting further in her complaint, that this was exclusive of her right to a share of the estate as one of the Raja's heirs, after satisfaction of the dower debt. The defendants pleaded, that by such dower being in law the mother's estate, recoverable by her heirs from the property of the husband. A written acknowledgment of the husband to one of the wife's heirs, after her death, held to be sufficient proof of the amount settled as dower. The heirs of a wife at her demise, being her husband; a daughter; a brother; and three sisters; the husband takes a fourth of

that the Raja never acknowledged it to be due, after her death; that she received from him in presents at different times above a lack of rupees; that the zemindaree was not an estate left by the late Raja, but was held under a conveyance from him executed in his life-time. The principal written evidence in the case was an *ikarnama*, or engagement, purporting to be by the late Raja to his daughter the plaintiff, under date the 15th *Jumad-os-sani* of the *Fusslee* year 1205, and reciting, that half her mother's dower "of 75,000 rupees" was due to the daughter; that during his life, he would support her; and that her claim would at his death be payable from the estate. This instrument was stated to have been executed on a threat of the daughter to sue for her portion. The defendants affirmed it to be forged.

Judgment went for the plaintiff in the Zillah Court, the decree of which recited, that from evidence of witnesses for the plaintiff, there was proof that, at the marriage of the plaintiff's mother, the sum of 75,000 rupees was the dower settled on her; that more than 10,000 rupees had been settled on others of the family; that the Raja's *ikarnama* to his daughter was proved by the subscribing witnesses; that the pleas of the defendants, of which the inconsistency was remarked, were not substantiated by their evidence. And it was adjudged, that the sum claimed should be paid to the plaintiff, half by Ali Buksh, and half by the two minors; this appearing to be their respective proportions of the profits of the estate.

In appeal by the defendants to the Provincial Court of Patna, the Zillah decree was affirmed.

1804.

On a further appeal to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington), objections were principally urged against the evidence in favour of 75,000 rupees having been the amount of the dower (and that this particular sum was fixed at the marriage, the Provincial Court had not considered to be proved satisfactorily by the oral evidence): and it was prayed that the law officers might be consulted on the case. The following question was proposed to them by the Court: if, according to the evidence of witnesses for the respondent, the dower of the Raneé Omda Beebee, mother of the respondent, was fixed, at the time of her marriage with Raja Gholam Hosein, at 75,000 rupees: and some time afterwards (in 1198) she died, leaving heirs, the Raja her husband; Kaeem Beebee, her daughter; Husun Ali, her brother; Mokoo, Phekoo, and Ameerun, sisters: and afterwards, in 1205, Raja Gholam Hosein died, leaving heirs Kheiroo Beebee, his mother; Baeem Beebee, a daughter by Omda Beebee; Imam Buksh Khan, a son by a different mother; Sooruj Beebee, Nadira Beebee, and Niamut Beebee, daughters by another mother; and Mootee and Pearoo, mothers of the above son and daughters: and if Omda Beebee, in her lifetime, neither claimed nor remitted her dower, could the heirs of Omda Beebee, after the death of the Raja, make a claim at law against his estate, for the dower, as her estate? and, if the heirs of Omda Beebee had the right to receive her dower from the estate of her husband, what part of this dower would fall by law to Kaeem Beebee, her daughter? —The answer returned by the law officers, after comments on the evidence, was in substance this: the evidence of the witnesses stating themselves to have been present at the ceremony does not prove the dower; but the *ikrar-nama* of the Raja is proved: and by virtue of it, the heirs of the wife can claim her dower from the husband's estate. Of 75,000 rupees, the amount of it, a sum of 18,750 (a fourth), being the husband's share as heir, ceases to be a debt against him: of the remainder, Kaeem Beebee the daughter will get 37,500 (a moiety); Husun Ali Khan the brother, 7,500 (a tenth); Ameerun, Mokoo, and Phekoo, sisters, 3,750 (a twentieth) each. Under this *fatwa* the Sudder Dewanny Adawlut affirmed the decrees of the lower Courts; with an option to the appellants to give to the respondent, instead of the amount adjudged and interest, a third of the zemindaree left by the Raja; to be in lieu of the said amount, and of her right as an heir to her father; which the respondent, that the family estate might not be sold to raise the money adjudged to her, had agreed to accept, leaving the remainder entire to the other heirs. (a)

(a) Dower is due on the consummation of marriage, unless deferred by the terms of the settlement to a future period (*Hedaya*, vol. 1, p. 123 and 150); and after the death of the parties, the heirs of the wife are entitled to take the dower out of the husband's estate (*Hedaya*, vol. 1, p. 155); deducting the husband's portion as one of his wife's heirs, if she die before him. (*Ibid*, p. 156).

RADHAMUNEE DIBEH, Appellant,

1804.

versus

SHAMCHUNDER and ROODERCHUNDER, Respondents. Sept. 27th.

THIS was a suit brought by Radhamunee Dibeh in the Zillah Court of Mymunsing, in July 1794, against Shamchunder and Rooderchunder, to recover 1 ana, 6 gundas, 3 cowries, of the pergunnas Mymunsing and Zufurshahi; of which portion the annual profit was stated at 2,500 rupees. The plaintiff claimed as heir of her husband, the late Gobindchund Chowdry, who, with his two brothers, the defendants, had held 4 anas of the pergunnas abovementioned in family partnership. The claim therefore was for a third share of these 4 anas; to which claim the defendants pleaded, that their brother made over his landed property to them, before he died; and that the plaintiff was only entitled to maintenance. Documents were adduced by each party; particularly an *ikrarnama* by the plaintiff, purporting to have been executed by the defendants; and a deed of conveyance to the defendants, termed *Swut-teag-putr*, purporting to have been executed by the deceased brother, and reciting, that he relinquished his landed estate to them, and that his moveable property was to be expended for certain pious purposes, after discharging funeral expences. Little evidence was taken in the Zillah Court; for the Judge, reciting in his decree, that both parties, as far as evidence was heard, had brought false witnesses, rejected the documents of both sides, without proceeding further; and, according to an opinion taken from his Pundit, declaring, that the succession to the property of a man dying without issue vests in his widow, gave judgment for the plaintiff, for the share claimed.

In appeal to the Provincial Court by the defendants, all the witnesses named were directed to be examined. From the result of their testimony, the *ikrarnama* was considered a forgery; but the deed adduced by the defendants was deemed sufficiently established. The Provincial Court put a question to their law officer, reciting, that a zemindar died, leaving two brothers and a widow, and, four or five days before his death, aliened his estate to his brothers, leaving his wife to be maintained by them; and required his opinion whether an instrument making such alienation was legal: and, after receiving an answer that it was good in law, the Provincial Court reversed the zillah decree.

In appeal by the claimant against the above decision to the Sudder Dewanny Adawlut, it was principally urged, that the deed, as itself recited, was executed by Gobindchund when dying, and on that account would not avail in law: and that he was not of sound mind at the time. And the appellant's pleader represented, that Rutnesree, a witness whose evidence was taken by commission in this cause, on interrogatories put by the respondent, and who had merely stated that Govindchund gave a deed to his brothers, and signed it; but whose evidence had also been taken to the execution of the deed in another cause between the same parties in the Zillah Court of Rajshahi, respecting the part of the landed property of the appellant's late husband, there

In a suit by a Hindoo widow against the brothers of her husband, who died childless; to which the defendants pleaded a conveyance from the brother to them, executed during mortal sickness, four days before he died, held that in Hindoo law, the only question was, whether in point of fact he was of sound mind at the time. The deed rejected, on failure of proof to this point. Judgment goes in favour of the widow, as heir to the estate of her husband, revertible, at her demise, to the husband's next heirs. Respondents fined 200 rupees each and their *mokhtar* 50 rupees, for endeavouring to impose on the

1804. situated; had deposed in the other cause, that Govindchund was not in his senses; that he could not of himself sign the deed set up by the respondents, but that one of them (Shamchunder) guided his hand when he signed it. And the *vakeel* filed a copy of this deposition, attested by the Second Judge of the Moorsshedabad Provincial Court, to which Court the cause alluded to was appealed. The *vakeel* of the respondents filed another copy of this deposition, attested by the Judge of Zillah Rajshahi, but differing from the other. The original deposition was accordingly required from the Provincial Court; and it was found, that the copy filed on the part of the appellant agreed with it; but that filed by the respondents did not, the purport of the deposition being entirely changed. An enquiry was directed to be made on this point; and other depositions in the former cause to be transmitted. And in the mean time the Court, with reference to the plea urged by the appellant, required an opinion from their Pundits, whether, supposing the husband of the claimant to have executed the deed set up by the respondents, during severe illness, whereof he died four days after, such deed was good in law; to which the Pundits replied, that "severe illness did not prevent the validity of a gift of property moveable or immoveable; that if the person executing it were of sound mind at the time, the gift was valid: if he were not of sound mind, it would not avail."

Dewanny
Adawlut a
false copy
of a record.

From the return received through the Provincial Court, containing the investigation made by the Judge of Zillah Rajshahi, relative to the copy of Rutnesree's deposition filed on the part of the respondents, the following facts appeared: On the 20th of June 1800, while this cause was depending in appeal before the Provincial Court of Dacca, (after the decrees were passed in the other cause in the Rajshahi Zillah Court, and Provincial Court of Moorsshedabad), the respondents, through one Shamkishor Neogee, their *peishkar* (since deceased), petitioned the Rajshahi Zillah Court for a copy of the deposition of Rutnesree, for the avowed purpose of filing it in the Mymensing Court, in this suit; and leave having been obtained for his being furnished with a copy, the *peishkar* of the respondents, either without the knowledge of the native officers of the Court, or by collusion with one or more of them, altered in several places the copy of the deposition deposited in the Zillah Court (the original, as is usual, having been sent to the Provincial Court, with the rest of the proceedings), and obtained a transcript of the copy so altered, bearing the attestation of the *serishtadar*, and of the Judge: in which copy, in the place where the deponent had said that Gobindchund was insensible, he had managed to alter it to "not insensible." The respondents having been detected in this attempt to support the validity of the conveyance which they pleaded, and to prove by such means that Gobindchund, when he executed it, was of sound mind, it appeared to the Sudder Dewanny Adawlut that reliance was not to be placed on the deed, nor on the other witnesses on the part of the respondents, most of whom were their servants: and besides, from the original deposition of Rutnesree in the former cause between the parties, there appeared strong ground to conclude, that, when the deed filed by the respondents was obtained from Gobindchund (who, it was there

stated, could not sign himself, but had his hand guided by Sham-chunder), he was not in possession of his senses. Without satisfactory proof, therefore, that he was of sound mind when the deed was signed, the Court determined that it could not be admitted to rebut the claim of the appellant. 1804.
Radhamu-
nec Dibeh,
v. Sham-
chunder
and Rooder-
chunder.

The decree of the Provincial Court of Dacca was therefore reversed, and that of the Zillah Judge affirmed, by the Sudder Dewanny Adawlut. (present H. Colebrooke and J. H. Harington) who directed, that the share in dispute, as the right of the claimant by succession to her husband (reverting by law, at her death, to her husband's next heirs), should be made over to the appellant, with mesne profits since the date of the suit. The costs in all the Courts were made payable by the respondents. And with reference to the fraud by which they had attempted to impose on the Court, as true, a falsified copy of Rutnesree's deposition, it was directed (under section 21, regulation 4, 1793), that a fine to Government of 200 rupees, should be levied from each of them; and a fine of 50 rupees from Ramgunga Das, their *mokhtarkar*, who, participating in the fraud, presented the copy of the deposition to be filed. (a)

(a) The points of law in this case were, 1st, the right of a widow to succeed to her husband's property, in the case of his leaving no male issue: (*Jimta Vahana*, Ch. 11, Sect. 1): and 2nd, the validity of a deed executed by a man in his last illness, if he be of sound mind; and the invalidity of it, if his mind be not in its natural state. This subject is treated in *Jugunnath's Digest*, (vol. 2, p. 299, 309).

1805.

COMMERCIAL RESIDENT AT PATNA, Appellant,

versus

April 29th. ADEET SING, and SHEOPURSHAD SING, Respondents.

Claim of
appellant
for sum of
5,924 ru-
pees, due on
engagement
of one of
the respon-
dents, dis-
missed; the
latter not
appearing
to have
failed in his
engage-
ment, and
appellant
having de-
prived him
of the
means of
performing
it.

THIS was an action for breach of engagement, brought by the Commercial Resident at Patna, in the Civil Court of that city, on the 26th of August 1800, to recover from Adeet Sing, and Sheopurshad Sing, the sum of 5,920 rupees. It appeared, that Adeet Sing, one of the defendants, had for many years been contractor for providing boats to convey from Patna to the Presidency the different annual dispatches of saltpetre. He was paid for the boats at a fixed rate in proportion to their size; and as it was necessary for him to make advances beforehand to the different proprietors or *mangees* with whom he engaged for them, it was the custom, from time to time, for sums of money to be advanced to him from the Residency for that purpose. On the plaintiff's adjusting accounts with him on the 21st of May 1800, there was an arrear of 6,682 rupees, against Adeet Sing, for former advances; and he, accordingly, on the above date, entered into an *ikrarnama* or written engagement with the plaintiff, on the security of the other defendant, as follows; "I, Adeet Sing, acknowledge myself in arrear for advances, to the amount of 6,682 rupees. I engage to furnish boats in good time, and to clear off the arrear by the end of October. If I do not clear it off, I will pay ready money." The plaintiff stated, that Adeet Sing, in opposition to his engagement, had refused to furnish boats required of him on the 1st of July; that after deducting the sum of 757 rupees, which had been accounted for, there remained a balance of the sum specified in the claim, due, under the engagement, from Adeet Sing and his security. Adeet Sing denied that the claim attached to him. After stating that the amount of the engagement consisted of balances outstanding with different owners of boats, he pleaded that the engagement was for a gradual liquidation of it, and obviously depended on his contract being continued to him as before, which had not been the case. He then proceeded to state, that, on the requisition of the plaintiff for a certain number of boats by the 1st of July, he prepared the number required; the hire of them, at the accustomed rate, being 3,678 rupees; that, of this sum, he demanded only 1,978 rupees, and consented to the deduction of the remainder, viz. 1,700 rupees, towards liquidating the amount of the engagement; agreeing also to similar deductions on the several subsequent dispatches, until the whole should be liquidated; that the plaintiff, however, refused to pay him any part of the boat hire for the first dispatch; and that he, in consequence, refused the plaintiff the use of the boats; upon which he was immediately deprived of his contract. These facts were admitted. It was the opinion, however, of the City Judge, that, under the letter of the engagement, as it was not specified that any fresh advance was to be made to Adeet Sing before he had cleared off the amount of the arrears, he had no right to demand any; and that, as he was considered to have violated the engagement by refusing the use of the boats required by the plaintiff on

the 1st of July, the whole amount became due from him immediately on that refusal. Judgment was therefore given in the City Court in favour of the plaintiff, for recovering his claim, with costs, from the defendants.

On appeal by the defendants (the late contractor and his security) from the above decree to the Provincial Court of Patna, the following were the grounds on which that Court did not concur in the decision: 1st, had the purpose of the engagement, entered into by the contractor, been to engage for the liquidation of the whole of its amount previously to any fresh payment of boat hire being made, according to custom, by the Commercial Resident, it was the opinion of the Court, that such intention would have been distinctly specified, together with the number of dispatches in which the liquidation was to be effected; and that no mention would have occurred of the amount being cleared off only by the end of October. 2nd, from the tenor of the engagement the Court considered it to be obviously meant, that the amount was to be gradually cleared off, and that, at each time of providing boats for the several dispatches of saltpetre, a certain fresh payment of part of the boat hire was to be made, and a certain part of it to be deducted towards clearing off the amount, until, by degrees, by the last dispatch in October, the whole should be liquidated. 3rd, the Court was of opinion, that the contractor should at all events, as a necessary consequence of the engagement taken from him, have been allowed to retain the contract during the whole season ending with October; and that the Commercial Resident, in taking the contract out of his hands before the expiration of the specified period, had forfeited his claim to the liquidation of the amount by the contractor, as he had deprived him of the means by which it was intended to be liquidated. The Provincial Court therefore reversed the decree passed by the City Judge in favour of the Commercial Resident; and dismissed the claim preferred by him against the contractor and his security, with repayment of costs to those persons.

On appeal by the Commercial Resident from the above decision to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), this Court concurred in opinion with the Provincial Court of Appeal, with respect to the nature and intent of the engagement. It appeared to the Court, that the contractor had not failed in the conditions of it; but that the appellant, in taking the contract out of his hands, and consequently depriving him of the means by which the amount of the engagement was to be liquidated, had rendered that amount no longer demandable from the contractor, and had himself become responsible for collecting the outstanding balances of which it consisted. A final decree was therefore passed by the Sudder Dewanny Adawlut, confirming the judgment given by the Provincial Court against the claim of the appellant; but in consideration of the amount claimed having been really due, under the engagement, from the respondents, (the contractor and his security), though, by an error of the appellant, the recovery of it from those persons was precluded, it was directed, that the costs in each of the Courts should be paid by the parties respectively.

1805.

Commercial Resident at Patna, v. Adeeet Sing and Sheo-parashad Sing.

1805.

SHEIKH MOOHUMMUD ALI, and SHEIK MURHUMUT

ALI, Appellants,

versus

May 22nd.

KASI RAM and others, (Heirs of DEENDIAL SING and SHEWUN SING), Respondents.

Claim of appellants to redemption of lands, on which they had executed deeds of mortgage and conditional sale redeemable within a certain time, on plea that payment of the amount was tendered within that time. Judgment against appellants, no such tender being proved.

THIS was an action brought by Sheikh Moohummud Ali and Sheikh Murhumut Ali in the Zillah Court of Sarun, on the 30th of June 1795, or 18th of *Asarh* of the Bengal year 1202, against the heirs of Deendial Sing and Shewun Sing, to set aside certain deeds of *bye-bil-wufa*, or mortgage and conditional sale; and to recover possession of the villages Baltha, Chap, &c. twenty-two in number, the annual produce of which was estimated at 18,817 rupees. It appeared, that on the 1st of *Bhadon* 1195, blank deeds of mortgage and conditional sale were executed by the plaintiffs on the villages in question, for rupees 8,328, the amount of arrears of revenue due from the plaintiffs on account of them. The sale was redeemable before specified dates during the months of *Assin* and *Kurtic* of the following year; and the condition was that the sale should become absolute to any person who should pay the amount of the arrears to the Collector of the district, at the expiration of the stipulated time, if the deeds were not previously redeemed by the plaintiffs, by payment of the sum. The deeds were deposited with Jugmohun, a person in the Collector's confidence; to be filled up by him if requisite; and it appeared that he afterwards filled them up with the names of Deendial Sing and Shewun Sing. The plaintiffs stated this to have been illegally done, and required the deeds to be set aside, alleging that, before any of the specified dates, they tendered *tceps* or banker's promissory notes for the amount; but that the persons concerned refused the notes, and would not surrender the deeds. In an amended statement, the plaintiffs alleged their having tendered cash to the full amount within the stipulated time; but that this tender was refused. The defendants denied that there had been any tender of cash within the time during which the deeds were redeemable. They stated, that, in consequence of the money not being produced by the plaintiffs, the amount was paid by Deendial Sing and Shewun Sing, on the blank deeds being filled up with their names, and delivered to them; that the villages thereby became their property; and had now devolved on the defendants their heirs. From the suspicious nature of the statements of the plaintiffs, in first mentioning a tender of notes only, within the time of redemption, and afterwards alleging that cash had been tendered within that time; and from no satisfactory proof being adduced of the tender of cash; the Zillah Judge did not believe the assertion of its having been made; especially as it appeared improbable, that the plaintiffs, if cash had really been tendered and refused while the deeds were redeemable, should not have complained on the subject at the time, which they had every opportunity of doing. It being therefore considered, that, in consequence of no cash having been produced by the plaintiffs within the periods agreed on for redeeming the deeds, the sale of

the villages had become absolute to the persons of whom the defendants were heirs, the claim preferred by the plaintiffs to the recovery of them was dismissed in the Zillah Court, with costs. 1805.

On appeal by the plaintiffs from the above decision to the Provincial Court of Patna, some persons were called by the appellants to prove the alleged tender of cash within the stipulated time; but as it was considered by the Court, that their testimony was unworthy of credit, and that there was no proof whatever of the fact, the decree passed against the claim by the Zillah Judge was confirmed, and the appeal dismissed with costs. Sheikh Moolahmud Ali, and Sheikh Murhumut Ali, v. Kasi Ram and others.

A further appeal, preferred by the claimants to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington), was dismissed by the Court, with costs, on the same ground. (a)

SOOBUNS LAL, (pauper), Appellant,

1805.

versus

HURBUNS LAL and ROODER RAM, Respondents.

June 17th.

IT was stated in this case by Soobuns Lal, who was plaintiff in Claim of the Benares City Court, that he and the defendants Hurbuns Lal and Rooder Ram) who were his brothers, realized by trade carried on in family partnership the sum of 21,000 rupees: that Nirotum Das, the father of the parties, was, by the usage of the province, proprietor of the acquisitions of his sons; that he repeatedly desired the defendants, while living with them, to make a partition of the property, and to give the plaintiff his share; notwithstanding which, the defendants kept possession of the whole: that the father, in consequence, gave plaintiff a written document (now produced in Court) authorizing him "to receive his share of property" from the defendants; a short time after which he died. This action was therefore brought to recover a third share of the sum of 21,000 rupees. The defendants denied that the plaintiff had been in family partnership, or concerned in trade, with them; and contended that the plaintiff could have no claim whatever; 1st, that he could have no hereditary claim on them for a share of property, as the father possessed none; 2nd, that the property in question was acquired by the defendant Hurbuns Lal, and that the father had no legal authority to give the plaintiff an order for a share of property acquired by others of his sons. Witnesses were called by the plaintiff respecting the alleged partnership with his brothers, and also respecting the circumstance of the father having possessed property; but it not appearing to the City Judge, that there was any evidence to support the claim, it was dismissed, with costs recoverable.

(a) The transaction in the case appears to have been merely a conditional sale, which the plaintiffs executed to secure the punctual payment of arrears of revenue on a specified day. The persons to whom the defendants are heirs, did not take a mortgage of the lands, but about the time of the expiration of the period of redemption, when the sale became absolute, they paid the amount as the purchase money of the lands, and obtained possession. The plaintiffs having totally failed in proving the alleged tender of payment within the stipulated time, judgment was given against them in all the Courts.

1805. from the plaintiff, in the event of any property being hereafter discovered in his possession.

Soobuns
Lal, v.
Harbuns
Lal and
Rooder
Ram.

On appeal by the plaintiff to the Provincial Court of Benares, the claim was considered to be nugatory, from its appearing that Nirotum Das, the father of the parties, possessed no property whatever at the time of his decease; and from none being specified in the written order produced by the appellant. The decree passed by the City Judge was consequently confirmed.

On a further appeal to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), it was clear to this Court, from the evidence before it, that the father left no property at his decease, and that the money in possession of the respondents, or of one of them, to a third of which the appellant laid claim, was not acquired by the three brothers jointly in trade, though, at the same time, it did not appear that there had ever been a separation of the family. In consequence, however, of the assertion made by the appellant, that "a father was proprietor of the acquisition of his sons," in conformity with which principle the order of Nirotum Das on the respondents appeared to have been produced by the appellant as evidence of his claim, the law officers of the Court were called upon to state, under the Hindoo law as prevalent in the province of Benares, "whether, on the supposition that a person, not being separated from his father and brothers, and not having received a share of joint stock, acquire property himself, and, in acquiring that property, do or do not expend any of the stock, in these instances respectively is he sole owner of the property which he has thus acquired? or is it at the disposal of his father? or do shares of it accrue to his father and brothers?" The pundits gave their opinion as follows: "All property which a son may acquire while a member of an undivided family, without expending any joint stock, belongs to him exclusively; but if, in acquiring such property, he expend any joint stock, in that case two shares of the property so acquired belong to himself, and one share to his brothers: the father has no right to the acquisitions of his son." As there was satisfactory evidence, that the property in question was acquired by one of the respondents without expending any joint stock of the family; that it was realized by his exclusive industry in the service of a merchant at Benares: and that the appellant, who had previously been dismissed from the service of the same merchant, was at the time wholly unconnected with the concerns of both the respondents; it was pronounced by the Court, in conformity with the opinion of the pundits, that the property in dispute belonged solely to the respondent who acquired it, and that the appellant could have no claim to any part of it. The decrees passed against the claim by the City and Provincial Courts, were, in consequence, finally confirmed by the Sudder Dewanny Adawlut, and the appeal dismissed, with costs recoverable from the appellant, in the event of any property being found in his possession. (a)

(a) It was determined by the judgment in this case, that a member of an undivided Hindoo family need not share with the other members of the family his own separate acquisitions, made without aid from the joint stock of the undivided family.

RAI BALGOVIND (Heir of KHEALYRAM, deceased),
Appellant,

1805.

versus

June 24th.

SHEIKH GHOLAM ALI (Heir of SHEIKH ABDULLAH,
deceased), Respondent.

THIS was an action brought by the late Sheikh Abdullah, in Claim by the City Court of Patna, on the 26th of September 1793, or 7th respondent of *Asin* of the *Fusslee* year 1200, to recover from the heir of to principal Khealyram the sum of 9,692 rupees, as principal and interest of and interest a claim on bond. The circumstances were, that in the *Fusslee* of a bond year 1188, corresponding with 1781, Khealyram, a landholder who by his an- debt paid had fallen into arrears, borrowed, through the plaintiff, and on his cestor, as security, from a person named Masoom Beg, the sum of 7,001 ancestor of rupees. For the repayment of this sum a bond was entered into, appellant, in which interest was stipulated at somewhat more than 25 *per* Judgment *cent per annum*. In 1191, 5,618 rupees were repaid in part of prin- given for cipal and interest of the debt, and the bond, on which the present balance of action was brought, was executed for the balance of 4,932 rupees, only. In- principal hearing interest at the same rate; which interest had amounted, terest for- at the date of the action, to 4,760 rupees; making in principal feited, in and interest, the amount demanded. The ground on which the cosne- plaintiff preferred the claim, was that, in consequence of the bond quence of for 4,932 rupees not having been discharged by Khealyram, he had being stpiu- become responsible for it as security, and had paid the amount more than to Masoom Beg. The defendant pleaded, that both the bonds the legal were taken, while Khealyram was in confinement, for arrears of rate. revenue, in custody of the plaintiff (an officer of the Civil Court): that they were both taken by compulsion, and were on that account invalid; independently of illegal interest having been stipulated. From the circumstance of the amount of the bond, on which the present action was brought, being specified in it merely as a common debt, and not being mentioned as the balance of principal and interest of the former bond, it was the opinion of the City Judge, that, independently of the interest being usurious, under regulation 15, 1793, and consequently forfeited, there had been an attempt to elude the regulation, and to obtain by fraudulent means interest upon interest, which under the 9th section of the regulation, involved the forfeiture of the principal also; and was sufficient to authorize the total dismissal of the plaintiff's claim. The claim was accordingly dismissed on this ground in the City Court, with costs.

On appeal by the heir of the plaintiff from the above decision to the Provincial Court of Patna, that Court was of opinion, that, under regulation 15, 1793, the interest on the bond on which the action was brought, was forfeited, as being at an illegal rate; but that the bond itself appeared to have been taken on an adjustment of the account of the former one, without any fraud on the part of the claimant's ancestor; and that the claim to the principal was not affected by the rules laid down in the section quoted by the City Judge. As to the sum of 5,618 rupees, which had been paid in part of principal and interest of the first bond, bearing date in

1805. the *Fusslee* year 1188, corresponding with 1781, the Court considered that there could be no question respecting it, on the ground of the interest being illegal, as it did not appear, that in that year there was any regulation prohibiting the rate of interest which was stipulated to be received. And although it had been asserted by the heir of Khealyram, in the City Court, that the bond on which the action was brought, was, as well as the former one, extorted from Khealyram while under the power of Sheikh Abdullah, through whom and on whose security the money was borrowed, the Court did not attach any weight to the assertion, there not being any proof, nor, in the opinion of the Court, any reason to suppose, that he had given either of the bonds against his will. The decree of the City Judge was therefore reversed by the Provincial Court, and the principal of the latter bond adjudged to the heir of Sheikh Abdullah.

Rai Balgo-
vind, v.
Sheikh
GholamAli.

On appeal by the heir of Khealyram from the above decision to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), this Court did not concur in the opinion of the Provincial Court of Appeal with respect to the legality of the interest on the first bond, bearing date in the *Fusslee* year 1188, corresponding with 1781, but observed that interest at the rate stipulated by it was prohibited by the regulation of 1772, which restricted interest to 24 *per cent per annum* on sums exceeding 100 rupees, on pain of forfeiting the interest altogether, in the event of its being stipulated at a higher rate; as well as by a regulation enacted on the 28th of March 1780, or 6th of *Chey*t of the *Fusslee* year 1187, restricting interest under the same penalty, to 12 *per cent*. And as the rules against usurious interests, contained in those regulations respectively, were confirmed, for the periods to which they relate, by regulation 14, 1793, it was pronounced by the Sudder Dewanny Adawlut, that the penalty of the latter regulation must apply to both the bonds, and that, after the forfeiture of all interest, in consequence of the illegal rate at which it was stipulated, the judgment should be restricted to the balance remaining unpaid of the original loan of 7,008 rupees. The decree of the Provincial Court was accordingly amended, and after deducting from the original loan the sum of 5,618 rupees, which the evidence showed to have been repaid, the remainder, 1,390 rupees, was adjudged to the respondent. The costs were made payable by the appellant in proportion to the judgment in favour of the respondent; the rest by the respondent.

CASINATH, and others (Heirs of KASHMIRI MULL, deceased), 1805.
 Appellants,
versus
 ABOO MOOHUMMUD KHAN (Heir of BAHAUDUR BEG,
 deceased), Respondent. July 10th.

THIS was an action brought by the heirs of the late Kashmiri Mull in the Zillah Court of Behar, on the 25th of January 1795, or 20th of *Magh* of the *Fusslee* year 1202, to recover from the heir of Bahaudur Beg, the sum of 4,400 rupees, as arrears of rent, with interest, due under a lease; and also to set aside that lease, consequence of the terms not having been complied with. The circumstances stated by the plaintiffs were, that a lease of the talook of Hajipoor, which belonged to the late Kashmiri Mull, was granted by him to Bahaudur Beg, in the name of Omr Khan, the brother of that person, under an engagement for paying 4,001 rupees annually, as the *jumma* to Government, and 250 rupees annually, as *malikana* or rent to the lessor; that however, the public *jumma* only had been paid, and that, for arrears of the rent of 250 rupees, annually due, from the beginning of the *Fusslee* year 1191 to the end of 1201, the defendant was indebted to them the sum of 2,750 rupees, and interest amounting to 1,650 rupees; which, together, formed the amount specified in the claim. The defendant asserted that Omr Khan was the real and not the nominal lessee. He admitted, that the lease was for the sum stated by the plaintiff, viz. 4,251 rupees *per annum*, but alleged that Omr Khan had been directed by the lessor to pay it annually as follows; viz. 4,062 rupees as *jumma* to Government; twenty rupees to a *fukeer* named Shah Sultan Ahmud; and 169 rupees as an assignment in favour of Bahaudur Beg towards discharging a promissory note of 6,000 rupees, due to him from the lessor; that Omr Khan had been many years in possession under the lease, and that the payments had, during the whole time, been made as directed. The plaintiffs produced the *kuboolent*, or counterpart engagement stated by them, under the seal and signature of Omr Khan, specifying 5,001 rupees to be the *jumma* payable to Government; and 250 rupees the rent annually due to the lessor. A *potta*, or lease, corresponding with the above, from which it appeared that the lease was in perpetuity, was also produced in Court. The Zillah Judge having concluded, from testimony given by witnesses for the plaintiffs, that Omr Khan was only the nominal lessee; and it not appearing to him to be proved that the annual rent due under the lease had been paid; it was his opinion, that the arrears and interest, claimed by the plaintiffs, were recoverable from the defendants, together with possession of the talook, the lease of which was pronounced to be forfeited. Judgment was therefore given in the Zillah Court in favour of the plaintiffs, with costs against the defendant.

On appeal by the defendant (the heir of Bahaudur Beg), from the above decision to the Provincial Court of Patna, that Court did not concur in it. Two letters were produced before the Provincial Court, purporting to have been written by Kashmiri Mull,

1805. **Casinath and others, v. Aboo Moohum-mud Khan.** one to Omr Rhan, and the other to Bahaudur Beg, directing the sum annually due under the lease (4,251 rupees) to be paid in the manner stated by the heir of Bahaudur Beg in his answer in the City Court. The authenticity of these letters was considered by the Provincial Court to be established by the circumstance of its appearing that Kashmiri Mull, during a period of eleven years which elapsed between the date of the lease and the period of his death, never took any steps for the recovery of the rent, notwithstanding its not being paid to him; from which it appeared obvious to the Court that he must have directed it to be paid elsewhere. On the authority therefore of these letters: and on evidence given by two persons to their knowledge of the annual assignment of 169 rupees; and also on the admission of the *fakcer* Shah Sultan Ahmud, that he had received the annual allowance of 20 rupees; it was the opinion of the Provincial Court, that the payments required by the lease had been commuted by directions from the lessor, and that there could be no question respecting them. The decree passed by the City Judge in favour of the claim preferred by the heirs of Kashmiri Mull, was in consequence reversed, with costs against those persons.

On appeal by them from the above decision to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington) the two letters produced as evidence in the Provincial Court, reciting the directions stated by the respondent (the heir of Bahaudur Beg), and affirmed to have been written by Kashmiri Mull, were found to be dated at Benares on the 19th of *Rubbee-ool-Awul* of the *Fusslee* year 1191; whereas it was clearly proved to the Court by the appellant, that Kashmiri Mull was not at Benares at the period when the letters were dated. The letters therefore, together with the evidence given in conformity with them, respecting the assignment of 169 rupees, were rejected as unworthy of credit; more especially as the promissory note, for the discharge of which the assignment was stated to have been made, was affirmed by the appellants to be a forgery, and was not proved by the respondent. Had directions for paying the amount annually due under the lease, in the manner stated by the respondent, been really given by the lessor, it appeared obvious to the Court, that the particulars would have been inserted either in the lease or counterpart engagement; but there was no mention of any such arrangement in either of those documents. As the Court did not consider it established that there was any assignment from the lessor in favour of Bahaudur Beg, for the discharge of the alleged note of 6,000 rupees; and as the annual sum of 169 rupees was admitted, nevertheless, to have been received by Bahaudur Beg, and his successor the respondent; the latter was declared accountable to the appellants for the amount so received, with interest from the date of the institution of this suit. The decree passed by the Provincial Court against the appellants, was therefore reversed by the Sudder Dewanny Adawlut, and the arrear of 169 rupees *per annum*, with interest at the established rate from the date of the action, was adjudged to the appellants. The claim of the appellants to the remainder of the annual rent of 250 rupees did not appear to the Court to attach to the respondent, as it was not proved that Bahaudur Beg

was the lessee under the name of Omr Khan; which person the Court considered to be himself the real lessee. The receipt of the annual sum of 20 rupees from Omr Khan, under an order of the *mokhtar* or agent of Kashmiri Mull, being acknowledged by Shah Sultan Ahmud, the appellants were left at liberty to prosecute for its recovery either him, or the person who paid the annual sum to him, if they contested the authority for its payment. As the lease was not granted to Bahaudur Beg, and the lessee Omr Khan was not a party in the cause, the claim of the appellants to set aside the lease was rejected. It was however stated to the appellants, that if the lessee, or any person who might succeed him, should fail to pay at the proper time the sum annually due under the lease, and they should on that account demand its being set aside, they might prosecute the demand in a separate action. The costs in each of the Courts were made payable by the respondent.

1805.

Casinath
and others,
v. Aboo
Moohum-
mud Khan.

Mr. NOWELL, Appellant,
versus
MOOTEE RAM, Respondent.

1805.

July 15th.

THIS was an action brought by Mr. Nowell in the Zillah Court of Tihoor, on the 11th of May 1799, to recover from Mootee Ram the sum of 7,158 rupees. The plaintiff was an indigo planter. He stated that he had been in the habit of dealing with the defendant as a banker; that on the 3d of June 1797, on settling accounts with the defendant, there was a balance due from the latter of 6,725 rupees, of which 857 rupees were paid at the time; that there was still due from the defendant the sum of 5,868 rupees, with interest from the time of balancing the account to the date of the action, amounting at 12 *per cent*, to 1,290 rupees; the principal and interest, together, making the sum specified in the claim. The defendant contended, that the transactions with the plaintiff were carried on by him, not on his own account, but as *gomashita* or agent to the banking-house of Ruchpal Das, which failed shortly after the transactions took place; that he settled the accounts with the plaintiff after the failure, in the same capacity: and that he was not personally responsible. The defendant produced in evidence an *ikrarnama*, or written engagement of the plaintiff, dated in May 1796, relating to the terms of transacting business for that year, and mentioning the dealing to be "with the house of Ruchpal Das through Mootee Ram their *gomashita*." From a passage, however, in a letter (without date) from the defendant to the plaintiff, in which the defendant expressed his readiness to transact the plaintiff's concerns, without any distinct allusion to the banking house; and from its appearing that the defendant, after the failure of the house, had recovered sundry debts, and liquidated claims on it, which, in the opinion of the Zillah Judge, he would not have done as a mere *gomashita*; it was inferred, that the transactions of the plaintiff were with the defendant personally, and that the defendant was responsible for the principal and interest claimed. Judgment was therefore given in the Zillah Court for the plaintiff, with costs against the defendant.

1805.

Mr Nowell,
v. Mootee
Ram.

On appeal by the defendant (Mootee Ram) to the Provincial Court of Patna, that Court did not concur in the decision of the Zillah Judge. It was held, that no certain inference could be drawn in favour of Mr. Nowell's claim on Mootee Ram, from the passage in the letter to which the Zillah Judge adverted; that Mootee Ram, in settling the affairs of the house of Rajpal Das subsequently to its failure, as far as assets were in his hands, did no more than the ordinary duty of a *gomashta*; and that the acknowledgment contained in the written engagement of Mr. Nowell, dated in May 1796, was conclusive as to the transactions having been carried on by Mootee Ram as *gomashta* to the house of Ruchpal Das. And as, under the established custom, the *gomashta* of a banking house does not act on his own responsibility, it was pronounced that Mootee Ram was not responsible for the claim in question. The decree passed against him in the Zillah Court was consequently reversed, with payment of costs.

On appeal by Mr. Nowell from the above decision to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington), it was the opinion of this Court also, that the claim of the appellant did not attach to the respondent, the Court being satisfied from the contents of the appellant's written engagement, that the respondent, in his transactions with the appellant, acted merely as the agent of Ruchpal Das. The decree of the Provincial Court, absolving the respondent from the claim preferred against him, was therefore confirmed by the Sudder Dewanny Adawlut, and the appeal dismissed with costs.

1805.

Aug. 5th.

SHAH ILAHI BUKSH Appellant,

versus

SHAH CASIM ALI, Respondent.

Claim of inheritance by respondent, dismissed; respondent not being the legal heir of the last proprietor of the estate claimed by him.

THIS was an action brought by Shah Casim Ali in the Zillah Court of Tirhoot, on the 25th of November 1796, or 10th of *Aghun* of the *Fusslee* year 1204, to recover from Shah Ilahi Buksh, on the ground of hereditary right, certain lands in pergunnah Hajipoor, held exempt from assessment under the titles of *Ayma* and *Ser-shikun*. The annual produce of them was estimated at 601 rupees. The circumstances stated by the plaintiff were, that these lands had been the property of Moohummud Shufee, brother of his grandmother; that Moohummud Shufee entrusted the management of them to a person named Bhojoo, who regularly transmitted to him the accounts, and also, after his death, managed the lands for some time for his son Duleel Ollah, who succeeded him; that after the death of Duleel Ollah, which happened in the *Fusslee* year 1182, corresponding with 1776, the plaintiff, having proved his relation to the deceased, received from the Council at Patna a *towleut-nama*, or nomination to the trusteeship of a mosque and college to which the lands were attached; that, however, Ashruf Ali, father of the defendant, obtained possession of the lands by undue means; and on his decease was succeeded by the defendant. It

was contended by the defendant, that the plaintiff had no right of inheritance to the estate of Moohummud Shufee; that Moohummud Shufee transferred to Bhojoo his proprietary right in the lands; that, on the death of Bhojoo, they descended to Ashruf Ali, the defendant's father, who held possession for twenty-three years; and that they were now the defendant's right. The principal documents produced in the case were; 1st, the *towleutnama*, endorsed by the President of the Patna Council with the date "April 2, 1776," and investing the plaintiff with the trusteeship of the mosque and college, on the death of Shah Duleel Ollah, son of Moohummud Shufee. In this document the plaintiff was stated to be the heir, and described as son of the daughter of Moohummud Shufee's sister. 2nd, an *ikrarnama* or written engagement of Ashruf Ali (the date corresponding with the 8th of July 1776), noticing the *towleutnama*; accepting from the plaintiff the management of the lands, on a stated salary; and disclaiming all pretension to a right of property in them. The alleged transfer of the lands by Moohummud Shufee to Bhojoo was unsupported by evidence. The written engagement of Ashruf Ali, the defendant's father, though denied by the defendant, was considered by the Zillah Judge to be proved by witnesses for the plaintiff, and to establish that the defendant's father had no proprietary right in the lands; and as the *towleutnama* appeared to have conveyed to the plaintiff the right of holding the lands, as the heir of Duleel Ollah and Moohummud Shufee, the Zillah Judge was of opinion that he was entitled to recover them. Judgment was therefore given in the Zillah Court in favour of his claim, with costs against the defendant.

1805-

Shah Ilahi
Buksh, v.
Shah Casim
Ali.

On appeal by the defendant from the above decision to the Provincial Court of Patna, that Court concurred in it, and dismissed the appeal with costs.

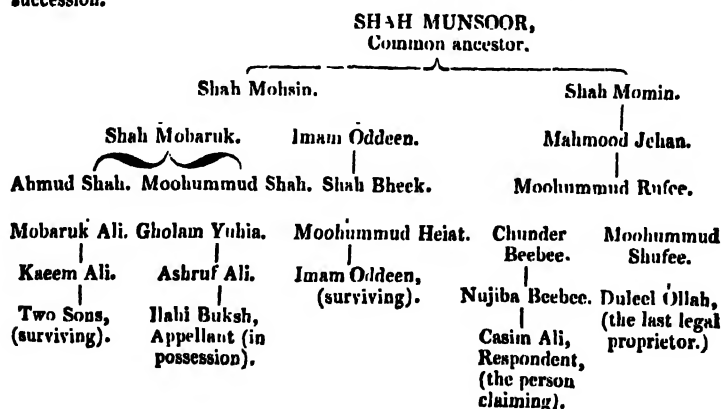
On further appeal by the defendant to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington), additional evidence was taken in the cause by order of this Court, to ascertain a point which appeared to it to be doubtful, viz. whether the lands in dispute were a religious endowment or hereditary property. The result established that they were the property of Moohummud Shufee, inherited from him by his son Duleel Ollah, who possessed them until his decease in the *Fusslee* year 1182; and that, from 1182 to 1203, Ashruf Ali, the father of the appellant, had possession; but how he obtained it, or under what right he held it, was uncertain. The parties, however, having agreed to rest the issue of the case on their right of inheritance to Duleel Ollah: and their respective relation to him having been ascertained, as specified in the annexed genealogical table; a reference was made to the Moohummudan law officers of the Court for their *futwa*, or exposition of the law, respecting the title of the appellant or of the respondent to inherit the estate. The answer of the law officers was as follows; "the claim of Casim Ali the respondent, who is only related to Duleel Ollah through females, is inferior to that of the relations in the male line. Moohummud Heiat, Gholam Yuhia, and Mobaruk Ali, were equally related in the male line, in the fourth degree of descent,

1805. to Shah Munsoor, the ancestor in the sixth degree, of Duleel Ollah. If Gholam Yuhia and Mobarruk Ali, as there is reason to suppose, died before Duleel Ollah, the whole of the property would devolve on Moohummud Heiat, and from him, on his son Imam Oddeen; if otherwise, those three persons, or their heirs, would be entitled to equal shares of it." It appearing from this *fatwa*, that the respondent was not entitled to inherit the lands claimed by him, the Sudder Dewanny Adawlut reversed the decrees passed in his favour by the Zillah and Provincial Courts, and dismissed his claim, with costs in each of the Courts. (a)

1805. BHOBINDUR NARAYEN, and BUNCHANUN DAS,
(Zemindars), Appellants,
Aug. 14th. *versus*
BISHENNATH RAI (Talookdar), Respondent.

THIS was an action brought by Bishennath Rai against Bho-
bindur Narayan and Bunchannun Das, in the Zillah Court of Mymensing,
on the 12th of December 1800, or 29th of *Aghun* of the Bengal
year 1207, to be relieved from an excess of 6,720 rupees in the
rate of *jumma*, or annual rent, exacted in the year 1206 on the
lands of Balasoti, the plaintiff's talook, situated in the pergunna
of Pokhurya, the zemindaree of the defendants. It was stated by
the plaintiff, that the defendants, on purchasing the pergunna of
Pokhurya, at public auction, brought a summary suit against his
late *naib*, or agent, respecting the rent payable on his talook dur-
ing certain months of 1206, and that, on the production of an
erroneous engagement of the *naib* consenting to the annual pay-
ment of 16,369 rupees, the same was adjudged to be the rate of
jumma payable in the year abovementioned: whereby there was

(a) The respondent, who was the original plaintiff, not being the legal heir, the Court gave judgment against him, but proceeded no further in the investigation of the right of succession, no claim having been preferred by the presumed heir at law against the person in possession. The case, however, as far as investigated, is an illustration of the Moohummudan law respecting collateral succession.



awarded, in favour of the defendants, the excess specified in the claim, above the annual rate demandable on the talook, which the plaintiff alleged to be *mokurreree*, or fixed, at 9,649 rupees, and not liable to increase. The defendants contended, that the *jumma* of the plaintiff was variable; that an increase of revenue had been assessed by Government on their zemindaree, and that a proportionate increase of rent being consequently assessable on the talook of the plaintiff, the *jumma* of that talook was raised to the sum specified in the engagement of the *naib*. It did not appear to the Zillah Judge, that the *jumma* of the plaintiff's talook was, as alleged by him, *mokurreree* or fixed, or that he was of that description of landholders mentioned in section 49, regulation 8, 1793, who, from having held their lands at a fixed rent for twelve years before the decennial settlement, were declared not liable to any increase. By a report from the Collector, it appeared that the revenue assessed on pergunna Pokhurya, was 52,544 rupees, and that there had been added a "*rusud beishee*," or gradual increase of 20,544 rupees. The share of this increase, payable on the talook of the plaintiff, was calculated at 3,804 rupees; which, in addition to 9,649 rupees, the former rent of his talook, amounted to 13,452 rupees. This therefore was considered to have been the proper *jumma* of the talook in 1206. At the rate thus adjusted, the rent due from the plaintiff from the beginning of *Sawun* to the end of *Cheyt* of the above year (the period to which the summary suit related), amounted to 11,561 rupees; whereas the sum of 14,067 rupees had been demanded and recovered, in that suit, for the period stated, by the defendants from the plaintiff. The difference, therefore, was deemed recoverable by the plaintiff, and was adjudged to him accordingly in the Zillah Court, with proportionate costs against the defendants.

The plaintiff (the *talookdar*) being dissatisfied with the above decision, appealed from it to the Provincial Court of Dacca. It appeared to that Court, from documents in possession of the *talookdar*, under which he held his talook, that the rent of it for more than twelve years prior to the decennial settlement, was 9,648 rupees; and that, in the time of the former zemindar, it did not vary from that sum. In this case, the *jumma* of the *talookdar* being considered as fixed, it was held that the zemindars, on their purchase of the pergunna, were not entitled, under the regulations, to exact from him more than he had before paid; and that the Zillah Judge was not correct in determining that an increase of 3,804 rupees, under the head of "*rusud beishee*," was assessable on the talook. The following was the adjustment made by the Provincial Court. From the sum recovered by the zemindars from the *talookdar* in the summary suit, on account of rent due from the beginning of *Sawun* to the end of *Cheyt*

Rs.	
1206; viz.	14,067
deduct rent due for that period, at 9,648 Rs. <i>per annum</i> , viz.	8,291

and there remains an over-payment of rupees 5,776
 This sum was accordingly adjudged to the *talookdar*, with interest from the date of the summary decision, and costs against the zemindars.

1805.
 Rhobindur
 Narain, and
 Bunchannun
 Das, v.
 Bishennath
 Rai.

1805.

Bhobindur
Naraen, and
Bunchanun
Das, v.
Bishennath
Rai.

On appeal by the zemindars from the above decision to the Sudder Dewanny Adawlut (present H. Colebrooke, J. H. Harington and J. Fombelle), this Court did not concur in it. From the documents relating to the talook, produced in the cause, it was not considered to be proved, that the rent paid for twelve years, prior to the decennial settlement, was the fixed sum of 9,648 rupees, as supposed by the Provincial Court; it appearing, on the contrary, that additions had been made to that assessment within the period stated. The *jumma* was consequently deemed variable; and as no mention of a *mokurreree* tenure occurred in any authentic document, it was determined that the respondent had no right to hold the talook at a fixed rent. The claim preferred by the respondent to be relieved from the excess above the annual rate at which he alleged the *jumma* to have been fixed, was therefore dismissed by the Sudder Dewanny Adawlut; with an order for his refunding to the appellants, with interest at the usual rate, whatever sums he had received from them under the decrees of the Zillah and Provincial Courts. As the respondent, however, appeared to have a proprietary right in his talook, which, under the provisions of regulation 8, 1793, entitled him to have it separated from the zemindaree of the appellants, he was advised to apply to the collector of the district for separation, in order that his *jumma* might be adjusted for future years according to the regulations; and, until the separation should take place, it was recommended to the parties to adjust the rent of past years according to the engagements entered into by the respondent's *naib*. The costs in each of the Courts were declared payable by the respondent. (a)

Notice respecting period of twelve years referred to in this case. (a) The period of twelve years, noticed in the decisions of the Zillah and Provincial Courts upon this case, has reference to section 49, regulation 8, 1793, which declares that tenants at a fixed rent (denominated *istemrardars*, or *mokurrereedars*) "who have held their land at a fixed rent for more than twelve years, are not liable to be assessed with any increase either by the officers of Government, or by the *zemindar*, or other actual proprietor of land." This rule was enacted, at the time of forming a permanent settlement of the land revenue in the year 1790, and was in consistency with another rule (section 76, regulation 8, 1793,) whereby Government exempted from any increase of the public assessment "all separate talooks, as well as all lands heretofore paying revenue immediately to Government, which may have been held at a fixed *jumma* during the last twelve years."

MEER NUJIB OLLAH, Appellant,
versus
 MUSSUMMAUT DOORDANA KHATOON, Respondent. 1805.
 Aug. 21st.

THIS was an action brought by Doordana Khatoon in the City Court of Patna, on the 12th of April 1799, to recover from Nujib Ollah 80,000 rupees, as the amount of dower settled on the plaintiff at her marriage. The plaintiff was the widow of a person named Burkut Ollah Khan, who died at Patna in 1793, leaving property to a large amount. The defendant was a natural but acknowledged son of Burkut Ollah, and, on his decease, obtained possession of the greater part of his estate, estimated at 300,000 rupees. On the part of the plaintiff it was proved, that her marriage with Burkut Ollah was celebrated in 1759, and that, previously to the ceremony, the sum now demanded was settled on her as dower. The deed of settlement, as produced in evidence, specified the dower at "5,000 gold mohurs, or 80,000 rupees; one-third to be "*moujjul*," or payable immediately; and two-thirds to be "*mowujjul*," or not exigible during the continuance of the marriage." The defendant contended, that, under the Moohummudan law, as well as under the regulation of limitations (3, 1793), the claim was not cognizable, on account of the length of time which had elapsed without its being preferred. The law officers of the City Court were consulted on the case. They gave it as their opinion, that, under the Moohummudan law, the cognizance of claims to dower could not be limited to any specific term; and that, of the sum in question, both the part which was payable on demand, and that which was not exigible during the marriage, were equally recoverable from the estate of the husband. It was the opinion of the City Judge, that the period of twelve years, to which the cognizance of suits is restricted by the regulation of limitations, should, in the present case, be reckoned from 1793, the date of the husband's decease, and not from the date on which the deed of settlement was executed; and that, as the present action was brought in 1799, and the restriction laid down in the regulation consequently did not apply, the plaintiff was entitled to recover her claim from the estate of her husband, as far as assets should be found in the defendant's hands. Judgment was therefore given for the plaintiff in the City Court, with costs against the defendant.

An appeal from this decree was brought by the defendant to the Provincial Court of the division. It was now alleged on the part of the appellant, 1st, that 10,765 rupees had been received by the widow in part payment of her dower; 2nd, that property to a large amount had been embezzled by her from the estate. The latter plea was not established. In proof of the former, a receipt for the sum was produced, on the authority of which, the Court admitted it to have been paid to the widow. With the deduction of this sum, the widow (or respondent) was declared entitled to the remainder of her claim, which was accordingly adjudged to her, with costs against the appellant.

On further appeal to the Sudder Dewanny Adawlut (present

1805. J. H. Harington and J. Fombelle), the following were the grounds on which this Court amended the above decrees. The receipt, on the authority of which 10,675 rupees were deducted by the Provincial Court from the amount claimed as dower by the respondent, was denied by her to be genuine; and as no evidence was adduced by the appellant in support of it, the Court judged it inadmissible. With respect to the deed of settlement, it was held, that the claim to the two-thirds of the dower, which were not exigible during marriage, or, in other words, were payable on the decease of the husband, was not affected by the rule laid down in the regulation of limitations, as, at the commencement of the present suit, twelve years had not elapsed since the husband's death: but the recovery of the remaining third, specified as payable on demand, was held to be barred by the regulation, in consequence of the long period (about forty years) which had elapsed since it became due, without any demand having been made. Two-thirds of the dower claimed were in consequence adjudged by the Sudder Dewanny Adawlut in favour of the respondent, and the claim to the remaining third was dismissed. Of the costs in each of the Courts, one-third was made payable by the respondent, and two-thirds by the appellant; in proportion to the final judgment. (a)

1805.

JOGRAJ SAHOO, Appellant,

versus

Sept. 12th.

RAMOO SAHOO, and RUSIK DAS, Respondents.

Claim of respondents for amount of a bill of exchange given on credit to appellant. The partner, who granted the bill having given an acquittance on adjustment of accounts; and no collusion or unfairness in the transaction being shown; judgment given against the claim.

THIS was an action brought by Ramoo Sahoo and Rusik Das, in the Zillah Court of Behar, to recover from Jograj Sahoo the sum of 5,160 rupees, as principal and interest due on a bill of exchange. The plaintiffs, who were concerned in two banking houses, one established at Gya and the other at Benares, stated, that they gave to the defendant, on credit at Gya, a *hoondee* or bill of exchange on their house at Benares, for the sum of 3,000 rupees, which bill was accepted and paid; and, the value not having been repaid by the defendant, they claimed the amount, with interest to the date of the action. The defendant contended, that the bill was granted to him by Shunkur Lal, managing partner of the house at Gya, held in the name of his son Gunes, and of Ramoo, one of the plaintiffs; that, a few days after the date of the bill, he discharged the amount of it, at the house of Mahadeo Manic at Gya, to Shunkur Lal (who was also *mokhtar* or manager of the

(a) It was rightly determined by all the Courts, that the period of limitation could not be counted against the claim of *mehr*, or dower, from an earlier date than when it first became exigible. But the final judgment, on the same principle, distinguished between the portion exigible from the time of the marriage and the part not exigible till after the husband's decease. By the decision in this case it is determined, that exigible dower, not demanded during the period limited by the regulations for the cognizance of actions, cannot be subsequently recovered.

house of Mahadeo Manic), by causing the amount to be carried to account against sums due to himself from Muhadeo Manic, and to be credited to the house of Ramoo and Gunes; that the transfer was entered in the books of Mahadeo, and was approved by Shunker Lal, who gave the defendant an acquittance in the name of the house abovementioned. It appeared that the house of Mahadeo Manic failed within ten days after this transaction. The Zillah Judge was of opinion, as no money had been actually paid by the defendant in discharge of the bill of exchange, that neither the transfer of the amount, by order of the defendant, in the books of Mahadeo Manic, nor the acquittance pleaded by the defendant, were sufficient to preclude the plaintiffs from the recovery of their claim. Judgment was therefore given in favour of the plaintiffs, in the Zillah Court, for the principal and interest of the bill, with costs against the defendant.

1805.

Jograj
Sahoo, &
Ramoo
Sahoo, and
Rusik Das.

On appeal by the defendant from the above decision to the Provincial Court of Patna, that Court concurred in it, and it was consequently confirmed, with interest to the date of the Provincial Court's decree.

On further appeal by the defendant to the Sudder Dewanny Adawlut (present H. Colebrook and J. H. Harington), the Court reversed the above decisions, on the following grounds; 1st, the bill of exchange given to the appellant on the house of the respondents at Benares, was proved to have been drawn by Shunker Lal as manager and partner of the banking-house at Gya, under the firm of Ramoo and Gunes; and it was clear that he also gave an acquittance to appellant, in the name of that house, declaring the amount of the bill to have been discharged. 2nd, there did not appear to have been any collusion between Shunker Lal and the appellant; and it was found, that, after the transaction on which the present claim was founded, the respondent, Ramoo, was at Gya upwards of six months, in constant intercourse with the appellant, without making any claim on him; and further, that the appellant sued Ramoo for a sum of money in the Court at Gya, without the present claim being pleaded as a set-off, or at all noticed by the respondent; from which it was obvious, that he had not considered it to attach to the appellant. For these reasons the Sudder Dewanny Adawlut held, that the acquittance given by Shunker Lal to the appellant, must preclude the recovery of the sum claimed by the respondents on account of the bill of exchange granted by Shunker Lal. The claim was accordingly dismissed, with costs, in each of the Courts, against the respondents.

1805.

MUSSUMMAUT HYA-ON-NISA, and KHOONDGAR

ABDULLAH, Appellants,

versus

MOFUKHIR-OL-ISLAM, Respondent.

Sept. 17th.

Claim of respondent to superintendence of a religious establishment, and management of endowed lands. Judgment in his favour, with a reservation for his obtaining a *sannad* from Government.

THIS was an action brought by Mofukhir-ol-Islam, in the Zillah Court of Rajshahy, to recover from Hya-on-Nisa and Khoondgar Abdullah, the *sujadeh-nisheenee*, or right of superintending a religious establishment at Pagha, together with the *towleut*, or trusteeship and management, of certain rent-free lands attached to it, estimated to yield an annual value of 2,339 rupees. It was stated on the part of the plaintiff, that the institution was founded above a century ago, by his ancestor Moohummud Rufeek, under a grant from the existing Government, by which it was directed that the offices in question should devolve in hereditary succession on the lineal male heirs of the founder; that they devolved, accordingly, in the course of time, on Fyaz-ol-Islam, the father of Hya-on-Nisa, and maternal grandfather of Khoondgar Abdullah; that the father of the plaintiff, who ought to have been the successor, was by improper means kept out of the offices by the defendants, and, at the time of his decease, was about to prosecute for them. The defendants pleaded, that the offices had not been for many years in the plaintiff's branch of the family, and that, from no previous claim having been preferred to them, the present one was barred under the regulation of limitations. From an authenticated copy of the original grant, as produced in Court, it was proved, that the right of holding the offices was vested in the lineal heirs male of the founder, to the exclusion of females; and further, that the offices were to be held by the fittest person of those heirs. It was ascertained, that the plaintiff was a lineal descendant of the founder; whereas one of the defendants was descended from him by the intervention of females, and the other was prevented by her sex from holding the offices, under the provisions of the grant. With respect to the plea of lapse of time, set up by the defendants, as it appeared that the father of the plaintiff died about four years after the defendants got possession, and that the plaintiff, who was at the time a minor, brought the present action within six years after the period of his minority expired, so that the limitation of twelve years, prescribed by the regulation pleaded by the defendant, did not apply; it was pronounced by the Zillah Judge, that the claim of the plaintiff was not barred under that regulation, and that, as he appeared to be the legal successor, and the fittest person for the offices, he was entitled to recover them. Judgment was therefore given in the Zillah Court in favour of the plaintiff, for the possession and management of the establishment, and the lands attached to it; with costs payable by the defendants.

On appeal by the defendants from the above decision to the Provincial Court of Moorshedabad, that Court concurred in it, and dismissed the appeal with costs.

A further appeal having been brought to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington), the Court,

in order to determine the law of the case, stated the circumstances attending it to their Moohummudan law officers, and proposed to them the following question: "Under the *sunnud* for granting the offices of presiding over the institution, and of managing the lands, to the *furzundan*, or lineal heirs of the founder, is a daughter's son (as Khoondgar Abdullah) or is a daughter of the last incumbent (as Hya-on-Nisa) competent to succeed to it? or must the succession be restricted to the male descendants in the male line?" 1805.

Musun-
mant Hya-
on-nisa and
Khoondgar
Abdullah, v.
Mofukhir-
ol-Islam.

The *futwa* delivered in answer by the law officers, was that, "Khoondgar Abdullah is not, under the Moohummudan law, a *furzund*, or proper lineal descendant, being related to the founder only on the maternal side; and Hya-on-Nisa, although a lineal descendant, is precluded by her sex, according to the prevailing doctrine of law, from presiding over a religious institution; and although it is lawful for the trusteeship of the lands to be held by a female, Hya-on-Nisa cannot hold it in the present instance, from the offices in question being vested in one person, as well as restricted to males, under the provisions of the original endowment. A person must therefore be selected for the offices from the lineal male heirs." In consequence of the above opinion, a reference was made to the Zillah Court for the purpose of ascertaining the whole of the surviving lineal male descendants of the founder, and their several qualifications for the offices; and, it appearing from the report of the Zillah Judge, corroborated by the opinion of his law officer, that the respondent was in every respect the person best qualified for them, and entitled to enter on them, subject however, from the nature of the trust, to the approbation of the ruling power; he was declared the fittest person to be invested with the offices by Government. The decrees of the Zillah and Provincial Courts were accordingly confirmed, and the appeal dismissed with costs. It was ordered that the respondent should be put in possession of the offices, provided a *sunnud*, investing him with the same, should be granted him by the Governor General in Council, to whom a copy of the Court's decree was directed to be transmitted for that purpose. (a)

(a) The decision on this case was governed by the special conditions of the endowment, no less than by the general law respecting pious appropriations. The offices of principal of the institution, and of trustee and manager of the lands, had been reserved by the original assignment for a lineal descendant of the founder. According to the prevailing authorities of Moohummudan law, lineal descent intends the male line; and a female descendant in the male line is disqualified by sex for one of the offices. It became therefore necessary to select a person from the male descendants of the founder; and, the trust being of a public nature, it appeared proper, that the nomination of the person to be appointed should have the sanction of Government.

1805.

Sept. 17th.

MEER NUSRUT ALI, Appellant,

versus

MEER CASIM ALI, Respondent.

Claim of respondent to a moiety of his father's estate. A religious endowment pleaded by appellant, but not proved. Judgment given for a division of the estate among the legal heirs.

THIS was an action brought by Meer Casim Ali, in the Zillah Court of Sarun, to recover from Nusrut Ali, on the ground of hereditary right, a half share of certain lands exempt from assessment, in the pergunnas Undroo and Nurhun, estimated to produce annually the value of 2,600 rupees. The plaintiff stated, that these lands had been granted as a free gift to his ancestors, and had descended in regular succession to his father Aboo Turab, on whose decease the defendant, the elder and only brother of the plaintiff, wrongfully took possession of the whole. The defendant contended, that the lands were granted as an endowment on the tomb of Syud Hosein, a Moohummudan saint, and that the ancestors of the family had held them in trust, not under any proprietary title; so that there could be no claim to any part of them as an hereditary right. The defendant also pleaded that an *ibra-numa*, or deed of relinquishment, of the present claim, had been executed by the plaintiff, which was alone sufficient to render it not legally cognizable. From the term (*nuzur*, or *nuzur-i-durgah*), by which the plaintiff himself described the grant of the lands to his ancestors, and which term generally implies lands given as a religious endowment, it was considered by the Zillah Judge, that the lands in question must form a part of such an endowment; and, at all events, as the deed of relinquishment, produced by the defendant, was acknowledged by the plaintiff, and, though alleged to have been fraudulently obtained from him when a minor, did not appear, from the evidence, to have been executed by him before the age of fifteen, the period of majority under the Moohummudan law, it was considered to be valid, and to preclude the plaintiff's claim. Judgment was therefore given in the Zillah Court against the plaintiff, with costs.

On appeal by the plaintiff from the above decision to the Provincial Court of Patna, that Court did not concur in it. The law officers of the Provincial Court, on a reference made to them respecting the case, gave it as their opinion; 1st, that the deed of relinquishment, executed by the claimant, as it purported to relinquish a claim to lands which it denominated "*wuqf*," or assigned to pious uses, and not private property, was an invalid instrument; 2nd, that, under one of the grants to the family, which confirmed the lands to Aboo Turab, as a descendant of the person on whom they were originally conferred, they appeared to have devolved on him in hereditary succession, as *mutrooka*, or inheritable property, and could not be considered as *wuqf*, or assigned to religious uses. The Provincial Court, in pursuance of this *futwa*, determined the lands to be inheritable; and being of opinion that the claimant, in right of inheritance from his father Aboo Turab, was entitled to a moiety of them, gave judgment in his favour accordingly, with costs against the elder brother.

On appeal by the elder brother from the above decision to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H.

Harington), the law officers of this Court being referred to for their opinion, whether, under the various *sunnuds* or grants to the ancestors of the family, as produced by the appellant, the lands in question were inheritable, or otherwise, replied that, "the lands do not appear to have been granted originally, or to have been afterwards confirmed to Aboo Turab, as *wukf*, or an assignment for pious uses; they are inheritable property, and partible among all the heirs of Aboo Turab." The Court coincided in this *fatwa*, on a consideration of the contents of the *sunnuds*, from which there did not appear any reason to suppose that the lands had been conferred otherwise than as a personal grant. This was further corroborated by its not appearing that any trusteeship had ever existed with respect to them; which would have been requisite in the case of an endowment. The Court therefore pronounced, that the lands were the inheritable estate of Aboo Turab, the father of the parties, and that all his legal heirs were entitled to a share; and the names of those of them who survived having been ascertained by a reference to the Zillah Court, the following partition, as specified by the law officers, was considered to be the legal distribution of the estate; viz. the whole being divided into eighty parts, fourteen parts to each of the two sons of Aboo Turab (Nusrut Ali, the appellant, and Casim Ali the respondent); seven parts to each of his daughters, six in number; ten parts to his widows. Final judgment was therefore given by the Sudder Dewanny Adawlut, amending the decree passed by the Provincial Court, and awarding to the respondent the share to which he was entitled under the above partition. The shares of the other heirs, on whose part claims were received, were at the same time adjudged to them respectively. The costs were made payable by the appellant; and as he had borne the costs in the Zillah and Provincial Courts, and it did not appear that, previously to the present action, he was aware that the lands were inheritable property; no order was given for his refunding the profits which had accrued, in past years, on the shares adjudged to be restored by him to the legal proprietors (a)

1885.

Meer Nusrut Ali, v. Meer Casim Ali.

(a) The appellant's plea, that the lands were an endowment for pious uses, being rejected, the Court proceeded to determine the cause conformably with the law of inheritance, of which this was a simple case; an eighth being the share of one or more wives, and the residue devolving on sons and daughters, in the proportion of a double share to males. The Court ascertained the whole of the heirs, and included them in its decree, to render the judgment conclusive, in conformity with the express provisions of section 13, regulation 3, 1793.

1805.

Oct. 30th.

WUJIH-ON-NISA KHANUM, (widow and heiress of
MIRZA ALI), Appellant,*versus*ROSHUN-ARA KHANUM, (daughter and heiress of
BAKIR ALI,) Respondent.

Claim of
appellant
to recover
2,000 ru-
pees on a
written en-
gagement.
Judgment
against ap-
pellant, the
engagement
having been
written
without the
knowledge
or consent
of respon-
dent, on a
signed
blank, en-
trusted by
her to her
agents for
another
purpose.

THIS action was brought by Wujih-on-Nisa Khanum in the Zillah Court of Tipera, to recover from Roshun-ara Khanum the sum of 2,000 rupees, under a written engagement. The circumstances stated by the plaintiff were, that her late husband Mirza Ali, and his two brothers Bakir Ali and Husn Ali, were joint proprietors of an estate, and, in order to facilitate the management of it, divided it into three parts, each taking the superintendence of one of them, and agreeing at the same time to make an equal division of the produce of the whole; that, however, the part allotted to Bakir Ali, the defendant's father, being very productive, and that to which the plaintiff succeeded on her husband's decease, being much otherwise, Bakir Ali thought proper to recede from the agreement of dividing the produce; that the plaintiff, in consequence, at the time of the permanent settlement of the land revenue, was about to take measures for having the shares equally assessed in proportion to their produce, when the defendant, on condition of her foregoing the claim, entered into an *ikrarnama* or written engagement, through her agents Goorsunder and Ramchund, "to pay to the plaintiff the annual sum of 2,000 rupees, out of her own share of the estate." The defendant having failed to pay this sum for the first year (1202), the plaintiff brought the present action to recover it. The defendant denied that the claim attached to her, or that the engagement stated by the plaintiff was valid. She pleaded that her agents, having been furnished with blank papers, with her seal and signature affixed, to enable them to prepare requisite documents for making the settlement of her share of the estate, filled up one of them without her consent or knowledge, with the engagement in question. The engagement being produced by the plaintiff; and the defendant having acknowledged her seal and signature; it was the opinion of the Zillah Judge that her plea was unavailing, and that, as she had given the signed blank to her agents, she was bound by whatever was inserted in it. Judgment was therefore given for the plaintiff in the Zillah Court, with costs against the defendant.

On appeal by the defendant (Roshun-ara Khanum) to the Provincial Court of Dacca, that Court having before it satisfactory evidence that the engagement was obtained from the agents of Roshun-ara Khanum without her consent or knowledge, overruled the opinion of the Zillah Judge with respect to the contents of it being binding on her, and pronounced it to be an invalid instrument. The decree, passed in favour of the claim by the Zillah Judge, was therefore reversed by the Provincial Court, and the costs, as well as those in the Zillah Court, were declared payable by the claimant.

On appeal by the claimant from the above decision to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington), this Court concurred in the opinion of the Provincial Court, that

the engagement was not binding on the respondent, and determined that the appellant's claim was consequently void. The decree passed by the Provincial Court against the claim was therefore finally confirmed, and the appeal dismissed with costs. (a)

SUFDUR HOSEIN, Appellant,

versus

ENAYUT HOSEIN (for himself and others), Respondent.

THIS was an action brought by Enayut Hosein, in behalf of himself and others, in the City Court of Patna, on the 16th of December 1796, or 2nd of *Poos* of the *Fusslee* year 1204, to recover from Sufdur Hosein certain shares of a joint heritage stated to consist of rent-free lands, houses, and other property; the whole of which was valued at 9,600 rupees. This property was alleged by the plaintiff to be the estate of his father Hisam Ali Khan, who died in the *Fusslee* year 1193, corresponding with 1786, leaving two sons, himself and the defendant, (the defendant by a former wife;) a widow named Humida, mother of the plaintiff, and a daughter named Jumila, by the same mother; which daughter had since died, leaving a son, Peer Ali; and two daughters, Pheekun and Kumun; that the plaintiff, and the above children of his sister, in whose behalf as well as his own he sued, were all legally entitled to shares of the estate; but that the defendant kept possession of the whole of it. The defendant denied the claim, alleging, 1st, that the mother of the plaintiff and of his deceased sister, was not married to Hisam Ali Khan, and that, therefore, as illegitimate children, they were not entitled to succeed to any part of his property: 2nd, that the property in question never belonged to Hisam Ali Khan, the father; but that part of it appertained to the estate of the grandfather, and came into the defendant's possession by a gift from his widow, who, after his decease, took his whole estate, in payment of dower settled on her at her marriage; that a part consisted of bridal presents to the defendant's mother from her relations; and that another part was acquired by the defendant himself. From the evidence taken in the City Court the pleas of the defendant were not substantiated, it being proved that the mother of the plaintiff was married to Hisam Ali Khan, and that the property, with a small exception, was the estate of that person. It was consequently declared partible among his heirs, who were ascertained to be, the defendant; the plaintiff; and the persons for whom the plaintiff sued. The case having been referred to the law officer, to ascertain the legal distribution of the estate, (with the exception of one village belonging to it, in possession of the defendant's wife, which the plaintiff was directed to sue for in a separate

(a) The custom of entrusting agents with signed blanks being very prevalent, the decision in this case is important. It was adjudged, that the principal is not bound by an engagement, which his agent has inserted in the blank, without authority or against instructions.

1805. action), the following were the portions to which the heirs were declared respectively entitled (as explained in the remark annexed to the case), viz. the whole being divided into 960 parts, 336 parts were allotted to Sufdur Hosein, the defendant, as the son of Hisam Ali Khan by his first wife, who died before him; 484 parts to Enayut Hosein the plaintiff (including the share of his mother), as the son of Hisam Ali by his second wife who survived her husband; 70 parts in right of Jumila, the deceased daughter to Peer Ali, her son; and 35 parts each to Phekun and Kumun, her daughters. According to this distribution judgment was given in the Zillah Court, in favour of the plaintiff and the persons for whom he sued, with costs against the defendant.

Sufdur
Hosein, v.
Enayut
Hosein and
others.

On appeal by the defendant, Sufdur Hosein, from the above decision to the Provincial Court of Patna, that Court concurred in it, and dismissed the appeal with costs.

On further appeal to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington), the appellant, although no mention whatever had before been made by him of a will, and although nearly twenty years had elapsed since his father's death, produced a will, as his father's testament, making a partial distribution of the property among the heirs. This will showed the estate to have consisted of the property adjudged to have belonged to it by the City Court, and directly contradicted the plea on which the appellant had principally rested his defence, viz. that the respondent and his deceased sister were not legitimate children. As the document had been withheld during so long a period, it was not considered by the Court as competent to preclude a judgment on the case according to the law of inheritance. The Court therefore, concurring in the decrees passed by the City and Provincial Courts, finally confirmed the same with costs against the appellant; and with an order that the profits which had accrued since the date of the action, on the shares adjudged to the respondent and the persons for whom he sued, should be refunded to them by the appellant. (a)

(a) As the appellant could not be suffered to derive advantage from a will which had been dishonestly suppressed by him, and which directly contradicted the plea on which his original defence rested, the Court deemed the ultimate production of this document to be no bar against a decision upon the cause according to the law of inheritance. The case was a clear one under that law. The widow succeeded to an eighth of her husband's estate, or 120 parts of 960; the two sons, and the daughter, to the remainder, in the proportion of a double share to the sons, viz. 336 parts to each son, and 168 to the daughter; who afterwards dying, her share became divisible between her mother, her son, and her two daughters, in the proportion of a fifth, or 28 of the 168 parts, to the mother; 70 parts to the son; and 35 to each of the daughters. The share of the mother (or widow of Hisam Ali), consisting of her own eighth, or 120 parts, and of 28 parts which accrued to her on her daughter's death, devolved on her son Enayut Hosein; and, added to 336 parts, to which he succeeded in his own right, made his share amount to 484 parts; as specified in the report. The Moohummudan law of inheritance, and the mode of proceeding in applying it, are stated at length in the *Sirajiyah* and its commentary, translated by Sir William Jones.

CASIM ALI, Appellant,
versus
 FURZUND ALI, (Pauper), Respondent.

THIS action was brought by Fuzund Ali, in the Zillah Court Claim of Moradabad, on the 24th of November 1802, or 17th of *Rujub* ^{respondent} of the *Hijera* year 1217, to recover from Casim Ali a half share ^{to a moiety of his fa-} of 13,000 beegas of land, stated to be exempt from assessment, ^{ther's es-} together with houses, orchards, &c. The value of the half share ^{tate. Judg-} was estimated at 18,000 rupees. The plaintiff claimed this share ^{ment in his} as joint heir, with the defendant, of the late Shah Ali Khan, the ^{favour for} father of the parties by different mothers. He stated that, on the ^{a 7 ana} father's death, no division was made of the property, which the ^{share,} defendant took advantage of, and retained the whole. The defen- ^{under the} ^{law of in-} ^{heritance.} ^{A deed of} ^{plaint, declar-} ^{ed invalid,} ^{from pos-} ^{sion not} ^{maternal grandfather,} ^{and were made over by Asalut Khan, by having been} ^{gift, to the defendant and his father jointly; that therefore of held under} ^{it during} ^{the life of} ^{the alleged} ^{donor.} these twelve anas, the plaintiff had no title to any part. Of the ^{the} four ana share, which had belonged to the father of the parties, ^{the} the defendant alleged, with respect to the lands, that no partition could be made, as it was the custom of the family for them to be held by the eldest son; and that the other property must be set off against sundry valuable effects withheld from the estate by the plaintiff's mother. The defendant produced the deed of gift stated to have been made by Asalut Khan, transferring the whole of his property to the defendant and his father jointly. It was dated in the *Hijera* year 1179. No proof however was adduced by the defendant of his having had possession, under this deed, of any part of the lands purported to be conveyed by it, or of his having had possession at all, separately from his father, or of any of the lands specified in the claim. A *sunnud* from Doondee Khan, one of the princes of Rohilkhund, was also produced, bearing date in the *Hijera* year 1181, and settling on Shah Ali, (the father of the parties) as successor to Asalut Ali Khan, certain mouzas comprehending the lands in question, under the title of *mudud-mash*. In this *sunnud* the name of the defendant Casim Ali, had been inserted on an erasure, after that of his father, but was evidently an interpolation. The Zillah Judge considered it proved by the witnesses for the plaintiff, and by the *sunnud* from Doondee Khan, that the mouzas containing the lands in dispute, formerly held on an *istimraree* tenure, were settled by Doondee Khan, as *mudud-mash*, on the father of the parties, and that they must consequently be considered as his estate, divisible among his heirs; and, as the mother of the plaintiff, who was the only other heir besides the parties, had not put in any claim to share, the plaintiff was deemed entitled to share, equally with the defendant, the property stated in the plaint. Judgment was therefore given in the Zillah

1805. Court, in favour of the plaintiff, for the recovery of the moiety claimed by him; with costs against the defendant.

Casim Ali, v. Furzund Ali. On appeal by the defendant (Casim Ali) from the above decision to the Provincial Court of Bareilly, that Court concurred in it, and dismissed the appeal with costs.

On further appeal to the Sudder Dewanny Adawlut (present H. Colchbrooke and J. H. Harington), the following questions were proposed by the Court to their Moohummudan law officers: 1st, as the deed of gift, stated to have been made by Asalut Khan in favour of Shah Ali and his son Kasim Ali the appellant, allots no specific share to either of those persons, will it, in the event of its authenticity, and possession under it, being proved, be a valid deed? 2nd, under the *sunnud* of Doondee Khan to Shah Ali, in which the name of his son Casim Ali, is evidently an interpolation, are the lands in question to be considered as granted to Shah Ali, or as confirmed to him as the heir of Asalut Khan? 3rd, if the lands were the sole property of Shah Ali, to what shares are the appellant, the respondent, and Sahiba Dowlut (the mother of the respondent and widow of Shah Ali), respectively entitled? The *fatwa* of the law officers, in answer to this reference, declared; 1st, that possession is essential to the validity of a gift, whereas it did not appear that the appellant, or his father, had possession under the deed of gift from Asalut Khan, during the life of the stated donor; that this deed of gift, supposing its authenticity, and possession under it, to be established, would, under the Moohummudan law, be invalid, according to the opinion of *Aboo Hameefa*, from no specific shares being allotted to the persons in whose favour it was made; but that, according to *the two disciples*, it would be valid, and would entitle the appellant to a moiety of the property specified in the deed; 2nd, that, if the lands in question were previously the property of Asalut Khan, the *sunnud* of Doondee Khan must be considered to have confirmed them to Shah Ali; but that, if they were *jagir*, or any other temporary tenure which the ruling power might resume, they must be deemed to have been acquired by Shah Ali under the *sunnud*, and, on his death, were divisible among his heirs: 3rd, that, if they were the sole property of Shah Ali, the legal partition of them would be, seven anas to each of his sons (the appellant and respondent), and two anas to his widow, Sahiba Dowlut. The Court, in conformity with the opinion of their law officers, held the alleged gift from Asalut Khan to be invalid, from its not having been carried into effect during the life of the alleged donor, by delivery of possession; and, considering the lands to have been the sole property of Shah Ali under the *sunnud* of Doondee Khan, gave judgment for the legal partition among his heirs. A seven ana share of the property in question was accordingly awarded to the respondent, with costs against the appellant, and with the mesne profits of the share adjudged since the commencement of the suit. As no demand was made, on the part of Sahiba Dowlut, for the two ana share pronounced to be her right; and as she was alleged to have secreted sundry valuables from the estate, for which the appellant had a claim on her; no order was issued for giving her possession of her share; but she was declared at liberty

to bring an action for its recovery, so that the appellant might have an opportunity of settling his demand on her. It was at the same time signified to the parties by the Court, that the present decision related only to the proprietary right of the lands, and not to the right of holding them exempt from revenue. (a)

ANUNDCHUND RAI, a minor, (through his guardians),
Appellant,

1805.

versus

Dec. 4th.

KISHEN MOHUN BUNOJA, and others, Respondents.

THIS was an action brought by Anundchund Rai, through the Claim of medium of his guardians, in the Zillah Court of Jessore, on the appellant 30th of March 1801, or 15th of *Phagon* of the Bengal year 1207. to recover a talook for the recovery of a talook comprising Turuf Mukrumpore, the (sold by annual produce of which was estimated at 14,000 rupees. It was the Sheriff of Calcutta, stated on the part of the plaintiff, that the talook in question was as part of granted by his grandfather Kishen Deo Rai, when zemindar of his father's Mahmooshdahi, as a provision for his father Mahindur Deo Rai, estate,) on who, afterwards succeeding to the zemindaree, jointly with his the ground brother, in the Bengal year 1197, settled the talook by a deed of of a previous gift on his son the plaintiff, and put him in possession. The deed of it, made of gift, as produced by the plaintiff in Court, specified, that him by his Mukrumpore was the *nij*, or private talook, of the donor, and was father. to be similarly held by the plaintiff and his heirs successively. It Judgment appeared, that a partition of the zemindaree afterwards took place for appel- between Mahindur and his brother, and that the share of Mahindur lant, on proof of the was attached under a writ of the Supreme Court, and was sold in previous 1204, at the instance of creditors, by the Sheriff of Calcutta, gift. at which sale the talook in question was publicly purchased as part of the estate of Mahindur, (but under a protest from the plaintiff), by Kishen Mohun, one of the defendants, to whom possession was given accordingly. For the plaintiff it was con- tended, that the sheriff's sale of the talook to the defendant was void, as, at the date of that sale, it was not the property of Mahindur, with whose estate it was sold. The defendants pleaded, 1st, that it was bought at the sheriff's sale, by fair purchase, as the property of Mahindur; 2nd, that the gift, alleged to have been made of it to the plaintiff, was not real; and, at all events, was

(a) According to the Moohummudan law, as ascertained in this case, seizin, or possession, by the donee, is indispensable to the complete effect and validity of the gift in his favour. Another point of law which came under consideration, but which did not influence the decision, is the validity of a joint gift without discrimination of shares. The authorities of Moohummudan law differ on this question; but the prevailing authorities admit the validity of such a gift. But it would not be valid for property included in, or inseparably attached to that of another person (so as to be undefined): See case of Jaffer Khan, *versus* Hubshee Bee-bee, page 12. In the present case, the alleged gift being set aside on the ground first stated, the cause was determined according to the rules of the Moohummudan law of inheritance; which gives an eighth to the widow, and equal shares to the sons.

1805. **Anund-chund Rai, v. Kishen Mohun Bunoja.** invalid, from Mahindur's having retained possession, as would be proved. Among the evidence produced by the defendant, were papers relative to the accounts of the talook at different periods between 1197 and 1200, from which it appeared, that, at their respective dates, the plaintiff had not been mentioned as proprietor of the talook, or acknowledged as such by the Collector; and it being consequently considered by the Zillah Judge, that Mahindur had retained possession, notwithstanding the stated gift, it was his opinion that the gift, even if real, was void, and could not prevail against the public purchase of Kishen Mohun, the defendant. Judgment was therefore given in the Zillah Court against the plaintiff, with costs.

On appeal by the plaintiff from the above decree of the Zillah Judge to the Provincial Court of Calcutta, that Court concurred in the decision. It was considered by the Provincial Court, that the claim of the appellant, under the deed of gift, was further invalidated by the following circumstances, 1st, that, in 1197, when the deed was dated, Mahindur and his brother had not separated, and were joint proprietors of the zemindaree comprising the talook in question, on which account it appeared to the Court that a gift of the talook could not pass under the sole signature of Mahindur; 2nd, that, in 1201, the period of their separation, the talook was ascertained to have been included in the division of the zemindaree, and to have formed part of Mahindur's share. The decree passed by the Zillah Judge against the claim of the appellant, was therefore confirmed by the Provincial Court, and the appeal dismissed with costs.

On further appeal by the claimant to the Sudder Dewanny Adawlut (present H. C. Lebrooke and J. H. Harington), the above decisions were reversed on the following grounds: 1st, the reality of the gift was considered to be fully established, from its appearing that the deed containing it, executed by Mahindur in favour of his son, the appellant, was produced before the Collector of Jessore, and transmitted by that officer to the Board of Revenue, in the month of July 1793, corresponding with *Asarh* 1200; from which period to the time of Kishen Mohun's purchase at the sheriff's sale, in 1204, the talook appeared to have been held in the name of the appellant; and, although the talook was sold to the respondent, Kishen Mohun, as part of the estate of Mahindur, it was proved, that the attorney of the appellant advised the sheriff, at the time of sale, of the appellant's property in the talook, and cautioned him not to sell it. 2nd, the alleged acts of ownership in the talook, on the part of Mahindur, subsequently to the date of the deed of gift until the year 1200, could not, in the opinion of the Court, vitiate the gift, as they might have been no more than acts of guardianship, which it was natural and proper for a father to perform during the minority of his son. 3d, as to the objections urged by the Provincial Court against the deed of gift, from its being under the sole signature of Mahindur, and from the talook having been included in the division of the zemindaree which took place in 1202, between Mahindur and his brother, it did not appear to the Sudder Dewanny Adawlut, that either of these circumstances could affect the validity of the gift, because, in the

first place, the talook in question consisted of the private lands of Mahindur, and was given away by him, while only joint proprietor of the zemindaree, without injury to the joint rights of his brother; and, in the second place, it was natural, that, at the partition of the zemindaree, the talook given away by him, while only joint proprietor, should be included in the allotment of his own share.

1805.

Anund-
chund Rai,
v. Kishen
Mohun
Banoja.

With respect to the nature of the gift, it was considered, that Mahindur, who received the talook as a personal provision from his father Kishen Deo, made a similar settlement of it for the same purpose on his son; and that the fact of his having done so was not open to suspicion of fraud. 4th, as the validity of the purchase of the respondent, Kishen Mohun, and of his title to the talook, could only depend on his proving the talook to have been, at the date of the sheriff's sale, the property of Mahindur; and as, on the contrary, it was established to have been, at that time, the property of the appellant; it was determined, that the purchase made by the above respondent could not affect the ascertained right of the appellant to the talook, under the gift from his father. Judgment was accordingly given by the Sudder Dewanny Adawlut in favour of the appellant, for recovering the talook, with the profits of it since the date of his being dispossessed by the respondent Kishen Mohun. Interest was not awarded, in consideration of Kishen Mohun having been in possession under a fair title, though the purchase was not a valid one. And it appearing, that, of the three respondents, Kishen Mohun was the only one concerned in the purchase of the talook, and consequently the only one to whom the claim of the appellant attached; and the two others had been wrongfully sued in the present instance; it was ordered that the costs of the parties, in each of the Courts, should be paid by the appellant on one side, and by Kishen Mohun on the other. (a)

(a) Two questions were involved in the decision of this case; 1st, the reality of the gift, and good faith of the transaction; 2nd, the right of the giver, as a member of an united family, to give a part of the joint estate. The reality of the transaction was satisfactorily established by the notice of it in a report of the Collector to the Board of Revenue; and as it was natural, that Mahindur Deo should make the same provision for his son and apparent successor, which his father Kishen Deo, in like circumstances, had made for him, the Court saw no ground to suspect any fraud or dishonesty in the deed of gift. The point of law slightly noticed by the Provincial Court, has been fully discussed in books of Hindoo law; and the doctrine, which is followed in Bengal, supports the validity of the gift or alienation of land by one parcener to the extent of his share. At a subsequent distribution, his alienations are, of course, chargeable to his allotment and properly included in it. The Sudder Dewanny Adawlut, therefore, could draw no inference unfavourable to the gift, from the circumstance of the land being stated in the records of the subsequent partitions as a part of the donor's allotment. The right of Mahindur, moreover, to convey to his son the talook which he had received from his father, when sole proprietor of the zemindaree, appeared unquestionable, as the gift of the talookdaree tenure, which is distinct from the zemindaree right, and usually held as a dependency paying rent to the zemindar, did not destroy the joint right of the brother of Mahindur, in the zemindaree, previously to the partition of it between the two brothers in 1202; though, from the terms of the deed of gift, by which the talook was transferred to the appellant and his heirs, in full property, the Court considered the appellant entitled to have it separated from the zemindaree, and to hold it independently of the zemindar, under the provisions of Regulation 8, 1793; and accordingly instructed the appellant to take measures for its separation.

1805.

Dec. 16th.

SIDH NARAEN, Appellant,
versus
 FUTEH NARAEN, Respondent.

Claim of respondent to recover his estate from appellant, his adopted son, who had been entrusted with the care of it. A deed of adoption and gift, pleaded by appellant, contradicted not to entitle him to possession during the life of respondent. Judgment therefore in favour of the claim.

THE circumstances alleged in this case by Futeh Naraen, who brought the action against Sidh Naraen in the Zillah Court, were that, in the *Fusslee* year 1197, he adopted, as his son and successor, his nephew the defendant, and, after entrusting him with the management of his estate, went to Benares; that the defendant was in charge of it till the end of 1205, and regularly transmitted the accounts to the plaintiff; but that in 1206 he thought proper to take possession of it in his own name; and further, that he purchased two villages with the profits of it. The plaintiff therefore sued to recover the estate and the two villages, estimating the annual produce of the whole at 8,817 rupees. The defendant contended, that the plaintiff, on adopting him in 1197, made over his estate to him by gift, and, relinquishing worldly concerns, retired to Benares, to pass the remainder of his days in devotion. The defendant then pleaded; 1st, that, from the date of the gift to the institution of the present suit, a period of thirteen years, he had been in possession of the estate; which circumstance must preclude the plaintiff's claim under the regulation of limitations; 2nd, that a person, who had retired from worldly concerns, could not, under the established custom, return to them, and retract a donation which he had made. With respect to the two villages, the defendant denied the statement of the plaintiff, and alleged that they were purchased with money he had borrowed for the purpose, and were mortgaged for the amount. The document which was the principal evidence for the defendant in this case, was entitled "*dustavezi hibeht furzunder*," a deed of gift and adoption; declaring the adoption of the defendant, and promising, that he should share the estate of the plaintiff, as a son, with sons subsequently born; and that, in the event of no son being born, he should succeed to the whole of it. As it did not appear from the other papers produced in the case, that the defendant had been any thing more than manager during the greater part of the time the estate had been in his hands, so that the regulation of limitations, pleaded by him, could not affect the claim; and as, from the ascertained mode of life of the plaintiff at Benares, it was not inferrible, according to an opinion of the pundit of the Court, that he had retired from the world; the question wholly turned on the construction of the deed; according to which the Zillah Judge was of opinion, that the plaintiff was evidently entitled to a life interest in the estate. Judgment was accordingly given for the plaintiff, in the Zillah Court, for possession of the property, to devolve at his decease on the defendant, under the provisions of the deed.

On appeal by the defendant (the adopted son), to the Provincial Court of Patna, that Court concurred in the Zillah decision, more especially as a suspicion was entertained that the word "*hibeh*" or gift, in the deed, was an interpolation. The decree of the Zillah Judge was in consequence confirmed, as far as related to the original estate, with costs against the appellant. The two

villages, recently acquired, being considered unconnected with the present suit; and there being no evidence before the Court with respect to the mode of their acquisition; the parties were left at liberty to contest the right to them in a separate action. 1805.

On a further appeal to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington), this Court considered the word *hibeh* to be genuine; but held, from the tenor of the deed, that it was not intended to take effect immediately, being evidently meant as a deed of adoption, with a special provision for the adopted son's right of succession, or of participation in the inheritance. The decree of the Provincial Court was in consequence finally confirmed, and the appeal dismissed with costs. (a)

Sidh Narain, v. Futeh Narain.

BEHARI LAL, Appellant,

1805.

versus

MUSSUMMAUT PHCKOO and MUSSUMMAUT FUHMIDA, Respondents. Dec. 18th.

THIS was an action brought by Behari Lal in the Zillah Court Claim of of Behar, on the 21st of January 1794, or 5th of *Mugh* of the *Fusslee* year 1201, to recover from Phckoo and Fuhmida the sum of 18,851 rupees, as balance of principal and interest due on a mortgage. The persons, of whom the defendants were heirs, gave the mortgage to the plaintiff in the *Fusslee* year 1177, on certain lands, their property, for the sum of 11,552 rupees. The plaintiff received possession at the time, and had since enjoyed the profits, after paying the public assessment. The principal of the debt, and interest to the date of the action, after deducting the sums realized from the lands, was stated by the plaintiff to amount to the sum specified in the claim. The defendants contended, that, in a former action brought by them against the plaintiff to set aside the mortgage, before Mr. Mercer, Judge of the Patna Court, the sum of 9,422 rupees had been allowed as received towards clearing it, and that their claim was dismissed in consequence of a balance still remaining due; that, after deducting from the amount then pronounced to be due on the mortgage, the further sums since realized by the mortgagee, there remained due only a small amount, which the defendants were willing to discharge. From a calculation made by the Judge of the Zillah Court, it appeared to him that there was a considerable balance still due to the plaintiff. The mortgage deed was not produced

the appellant to balance of principal and interest alleged to be due on a mortgage. Judgment against appellant, it appearing that the special condition of the mortgage only entitled the mortgagee to receive the usufruct as interest, though lower than the legal rate, leaving the time of redeeming the mort-

(a) This case turned entirely on the construction of the terms of a special deed, by The construction being determined against the appellant, his plea of adverse payment of possession during more than twelve years, was of course set aside, as he had not the principal possession as proprietor under the deed, but as manager, for the greatest part of the period stated. The Court's determination on the construction of the deed the option equally set aside the appellant's second plea, that the respondent, having retired of the mort- from worldly affairs, was incompetent to retract a donation. The deed was not gagers. considered to confer an immediate gift: and the respondent was not shown to have entered into any devout order which would constitute a civil demise, and give the defendant a right by inheritance as adopted son.

1805. in Court: but, from a copy of it filed in the former suit before Mr. Mercer, it appeared to have been stipulated, that the lands should remain with the mortgagee until the redemption of the mortgage, without any express mention of interest, and that the mortgage should not be redeemed "in the middle of any year." Behari Lal, v. Mussumaut Phokoo and Mussumaut Fuhmida. This was construed by the Zillah Judge to mean, that the usufruct should be received in lieu of interest; which, under section 10, regulation 15, 1793, did not appear to him to be allowable longer than the 24th of March 1780, or 2nd of *Cheit* of the *Fusslee* year 1187, the date specified in that section, for commencing the limitation of interest upon mortgages. An adjustment was therefore framed, by adding to the amount of the mortgage debt an equal sum as interest, under section 6, of the regulation quoted, which formed the amount due on the mortgage on one side; and, on the other side, by crediting the gross receipts of the mortgage from the *Fusslee* year 1187, with interest; which left a balance due to the mortgagee in *Magh* 1201, or January 1794, when the present suit was instituted, of 13,394 rupees. This sum was accordingly awarded to the plaintiff, or mortgagee, by the Zillah Judge, with the further sum of 9,473 rupees, as interest accruing during the time the suit had been depending, a period of nearly eight years. Costs proportionate to the sum of 13,394 rupees, adjudged in part of the plaintiff's claim, were made payable by the defendants.

On appeal by the defendants (the heirs of the mortgagers) from the above decision to the Provincial Court of Patna, that Court did not concur in the adjustment of the Zillah Judge, or in the amount of interest adjudged for the time the suit had been depending, which, in the opinion of the Court, should, at all events, have been calculated only on the original debt. As it did not appear that there had been any express stipulation in the mortgage deed for the usufruct to be received in lieu of interest, it was the opinion of the Provincial Court, that the present was a common mortgage, and that the receipts of the mortgagee should be credited in favour of the mortgagers, from the date on which the mortgage was given. An account was accordingly drawn out by the Provincial Court up to the end of 1208, founded on the former decision of Mr. Mercer, and including some other receipts at that time disputed; which gave a balance of 5,405 rupees, due on the mortgage at the end of 1191; and, by adding to this balance an equal sum for interest, on one side; with a credit, on the other side, of the sums realized by the mortgage from the beginning of 1192 to the end of 1208, amounting to rupees 9,170; the balance due to the mortgage, on the latter date, was determined to be only rupees 1,640. The judgment of the Zillah Court was therefore amended, and the above balance awarded to the mortgagee, with proportionate costs.

On appeal by the mortgagee from the above decree to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harrington), this Court did not consider that either the Zillah or Provincial Court had adopted an equitable principle of decision in the case. From the stipulation of the parties to the mortgage, that the lands should be held by the mortgagee, and the profits

be received by him until the redemption of the mortgage, without any specific term for such redemption, except that, whenever it should take place, it should be at the end, and not in the middle, of a year, it appeared to the Court to have been obviously meant, according to a mode of mortgage prevalent at the time in the province of Behar, that the usufruct was to be in lieu of interest to the mortgagee, and that the redemption, by payment of the principal at the end of any year, was to be at the option of the mortgagers or their heirs. The Court observed, that the provisions of section 10, regulation 15, 1793, which were intended for the benefit of mortgagers, when the usufruct might exceed legal interest, by carrying the surplus above the legal interest, to the discharge of the principal, were not applicable to the present case, as it was ascertained that the profits of the mortgaged lands were not equal to twelve *per cent* on the amount of the debt; and the Court also observed, that it was specified in section 5, of the regulation quoted, that, when the rate of interest, stipulated between the parties, may be lower than the legal rate, no more than the rate so stipulated can be adjudged to the mortgagee. It was therefore the opinion of the Court, that, in the present case, the parties must abide by the terms implied in the mortgage deed, and that the mortgagee could not demand payment of principal or interest from the heirs of the mortgagers, but had a right to retain possession of the lands, receiving the usufruct for interest, until the heirs of the mortgagers should think proper to redeem the mortgage, by paying, at the end of any year, the amount of the original debt; or until that amount should be liquidated under the gradual operation of section 10, regulation 15, 1793, in the event of the usufruct increasing so as to exceed the rate of legal interest. The decrees of the Zillah and Provincial Courts were consequently reversed; and, as the claim of appellant, or mortgagee, to the amount specified in the original plaint, and the plea of the respondents, or representatives of the mortgagers, with respect to the mortgage having been nearly cleared from the usufruct, were equally invalid; the costs in each of the Courts were declared payable by the parties respectively. (a)

1805.

Behari Lal,
v. Mussum-
maut Phe-
koo and
Mussum-
maut
Fulmida.

(a) The decision in this case determines two questions relative to the sort of mortgage described in the report. 1st, it is determined (against the claim of the plaintiff,) that a mortgagee having, under the terms of the deed, accepted the usufruct in lieu of interest for an indefinite period, has no right to demand, at his own convenience, payment of the debt from the mortgager; but must await his voluntary payment of the principal, or the gradual extinction of the debt under the operation of section 10, regulation 15, 1793, in case the annual usufruct exceed the legal interest. 2nd, the rule above cited does not annul the stipulations of a mortgage, which may be in favour of the borrower, but has provided, that any excess above the legal rate of interest shall be applicable to the liquidation of the principal. A mortgage of this sort is intended to secure to the lender the punctual receipt of a sum not exceeding the legal interest of his loan; but the law does not permit it to be abused for the purpose of obtaining, under the name of usufruct, an usurious interest. 3rd, it is to be remarked, that the decision of the Provincial Court was erroneous, independently of the terms and conditions of the mortgage. The rule for allowing interest, only equal to the principal, regards cases where the interest is in arrear; not those where the interest is paid, or realized from the usufruct; or where the usufruct is stipulated to be received in lieu of interest.

1806.

H. PERON, Appellant,
versus

Jan. 12th.

J. B. RICHEMONT (Attorney to J. B. TAILHADE),
Respondent.

Claim by the appellant to set aside a power of attorney executed to the respondent by a person, since absent, and supposed, but not proved, to have perished. Claim rejected, in conformity with provisions of the French law.

THIS was an action brought by Peron against Richemont in the European Court of Chandernagore, on the 7th of September 1804, to set aside a power of attorney executed by Tailhade to the defendant. The circumstances were, that in September 1803, Tailhade, having a claim on the plaintiff, empowered the defendant, as his attorney, to sue for the recovery of it. In the beginning of September 1804, at which time the suit was undecided, Tailhade had occasion to make a voyage to the coast of Coromandel, on his private affairs. The ship, in which he embarked, was wrecked near the island of Sangor. He endeavoured to save himself on a raft, with his wife, his infant child, and a native servant, who had accompanied him; but, owing to the violence of the sea, he was washed off the raft, and the child with him; the others reached the shore in safety. The plaintiff, stating it to be the general opinion that Tailhade had not survived, brought the present action to set aside the defendant's power of attorney, on the ground that the powers of an agent cease with the life of the constituent. On the part of the defendant, it was pleaded, that the power of attorney was valid, as it was possible that Tailhade might be yet alive. The "Commissaire du Roi" gave it as his opinion, that the existence of the wife, who was shipwrecked with her husband, was sufficient evidence of the possibility of the husband's having been saved, and that, in consequence, the power of attorney from Tailhade to the defendant must hold good, until the plaintiff should produce a revocation of it from the constituent of the defendant, or should bring positive proof (which he had failed to do) of the constituent's death. An interlocutory sentence was accordingly passed against the plaintiff in the Court of Chandernagore.

On an appeal from the above sentence to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), preferred in conformity with the rules contained in regulation 1, 1805, this Court, having considered the circumstances of the case, was of opinion, that the power of attorney executed by Tailhade to the respondent, should be held valid and in force, until it should be revoked, or the death of Mr. Tailhade should be established by clear and positive proof; or, in consequence of the presumption arising from his absence, his heirs should have obtained an order to put them in possession of his estate, as provided by the French law in such cases. The Sudder Dewanny Adawlut, therefore, confirmed the sentence passed by the Judge of Chandernagore against the claim of the appellant, and dismissed the appeal with costs (a)

(a) The legal provision, referred to in the decree of the Sudder Dewanny Adawlut, is stated in *Donsart*, under the title "absent," in the following terms: "C'est une maxime consacrée par les meilleures autorités, que toute personne absente, et dont la mort n'est pas constatée d'une manière claire et précise, doit

BEIRAGEE PUNDA, Appellant,

1806.

versus

GOPEE MOHUN THAKOOR, and LADLEE MOHUN
THAKOOR, Respondents.

Feb. 3rd.

THIS was an action brought by Beiragee Punda, in the Zillah Court of Jessore, on the 10th of January 1800, or 26th of *Pous* of the Bengal year 1206, to recover from Gopee Mohun and Ladlee Mohun, certain lands situate at mouza Nurinderpoor in pergunna Chungotea. The annual produce was estimated at 525 certain rupees. The plaintiff claimed under a *sunnud*, dated the 11th of *Aghun* 1200, by which the lands were alleged to have been granted to his father as *birt*, or charity lands, exempt from the payment of revenue, by Rance Neelmunee, widow of Raja Srikaunt Rai, formerly zemindar of the pergunna in which they are situated. The plaintiff stated that his father held them exempt from revenue under the *sunnud*; that, on his father's decease, he succeeded to them; and that the defendants, having purchased at public sale the pergunna in which they are situated, wrongfully dispossessed him. For the defendants it was pleaded, that all the lands formerly held free of revenue under the title of *birt*, by Rance Neelmunee, were resumed by Government at the decennial settlement in 1197; that the Rance could have had no authority to make a grant of them; and that the defendants, in purchasing the pergunna Chungotea at a public sale, became proprietors of the lands in question. A copy of the engagement for the decennial settlement of the pergunna, made with the former zemindar, was produced by the defendants, to shew that the lands had been resumed, and included in the assessment; but as this document stated in general terms the resumption of the *birt* lands of the Rance, without specifying those in question, the Zillah Judge did not consider it to afford proof of their having been resumed. And as witnesses for the plaintiff deposed, that Rance Neelmunee held the lands as *birt* for a series of years; that she executed the *sunnud* produced by the plaintiff, transferring them to his father; and that

être presmée vivre jusqu'à cent ans; c'est-à-dire jusqu'au terme le plus reculé de la vie ordinaire des hommes. Cette présomption est tirée de plusieurs lois Romaines; le texte sacré avoit parlé de même. On ne perd point de vue cette présomption lorsqu'après un certain tems d'absence les magistrats permettent aux héritiers présomptifs de partager les biens de l'absent, dont ils sont envoyés en possession. Ce partage ne s'est jamais que provisionnel.

“L'envoi en possession des biens d'un absent ne s'est point assujéti à beaucoup de formalité. Quand l'absence est constante, les héritiers présomptifs présentent une requête au Juge, par laquelle ils demandent à être envoyés en possession, et à être autorisés de partager les biens de l'absent; et sur les conclusions du ministère public, qui sont indispensablement nécessaires dans ces sortes de demandes, le Juge prononce l'envoi en possession; ou le refuse, s'il ne croit pas juste de l'accorder. A Paris M. le Lieutenant Civil n'accorde ces sortes d'envoi en possession qu'après trois années d'absence, prouvées par acte de notoriété joint à la requête; ou par autre pièce équivalent.”

The modern code of French law has made some changes in the formalities to be observed in obtaining an order of possession, as well as in the period when it may be granted, and the consequences attendant on it. But the decision of the Court was governed by the law as it stood when the settlement of Chaudernagore was captured.

1806.

Beiragee
Punda, v.
Gopee Mo-
hun Tha-
koor and
Ladlee
Mohun
Thakoor.

the plaintiff's father held them under the *sunnud*; it was the opinion of the Zillah Judge, that the plaintiff was entitled to them, and judgment was accordingly given in his favour in the Zillah Court, with costs against the defendants.

On appeal by the defendants (the purchasers of the *pergunna*) from this decision of the Zillah Judge to the Provincial Court of Calcutta, that Court considered it to be proved from the copy of the late *zemindar's* engagement for the settlement, produced before the Zillah Judge, and from a letter explaining the settlement, addressed, at the time, by the Collector of the district to the Board of Revenue, that the particular lands now sued for as free of revenue under the title of *birt*, were resumed, with the other *birt* lands of the Ranee, at the decennial settlement, and included in the assessment of the *pergunna*. It was consequently held by the Provincial Court that the lands in question were included in the purchase of the *pergunna*, made by the defendants, and the decree passed by the Zillah Court in favour of the claim of Beiragee Punda, was reversed, with costs.

On appeal by Beiragee Punda from the decision of the Provincial Court to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), the grounds of the final judgment were as follow: from its appearing that the account given by the witnesses for the appellant, respecting the time and place of the alleged *sunnud* being executed, was at variance with the answers of the appellant, when questioned on the subject by the Sudder Dewanny Adawlut, doubts were entertained by the Court whether the document was even genuine; and, at all events, the Court deemed it not valid, on the ground of its appearing that the lands were settled by the *zemindar* on Ranee Neelmunee, merely for her personal maintenance, and that she had no authority to transfer them. It was evident, as noticed by the Provincial Court, that, at the decennial settlement in 1198, the lands in question, before held as *birt* by the Ranee, were resumed by Government, and included in the assessment of the *pergunna*, under the rules laid down for the resumption of private lands, in the 49th section of regulation 8, 1793. And it was found, that the Ranee, who did not die till upwards of two years afterwards, advanced no claim to hold the lands in question under the former tenure; and it also appeared, that in 1203, an action had been brought in the Zillah Court of Jessore, by the heir of the former *zemindar*, Srikaunt Rai, for the right of holding these and other lands exempt from revenue, and that, by the decree passed on the case (from which no appeal was preferred), the claim was rejected, and the lands declared liable for the public revenue. The Sudder Dewanny Adawlut, therefore, pronounced the claim preferred in the present case by the appellant, to be inadmissible. The decree passed against it by the Provincial Court was accordingly affirmed, with costs against the appellant; and the disputed lands were declared to be included in the purchase of the respondents, subject to the payment of the established revenue to Government.

RAMDHUN RAI, Appellant,
versus
 BISHENNATH BOSE, Respondent.

1806.

Feb. 7th.

THIS was an action brought by Ramdhun Rai in the Zillah Court of Jessore, on the 20th of February 1804, or 10th of *Phagun* of the Bengal year 1210, to recover from Bishennath Bose possession of "Kutymungla," and other villages, seven in number, the annual produce of which was estimated at 2,225 rupees. It was set forth in the plaint, that these villages were formerly held on a free tenure by Ranee Unpoorna, wife of Srikaunt Rai, once a considerable zemindar in the district; that in *Poos* of the Bengal year 1208, they were sold to the plaintiff by the Ranee; and that, as a lease of them, to the end of 1209, had been granted by the Ranee to a person named Nundoolal, the plaintiff, after his purchase of the villages, allowed the tenant to continue in possession till his lease expired, at which time the plaintiff took possession himself, and remained in possession till *Poos* 1210, when the defendant, with several others, forcibly dispossessed him. The plaintiff therefore demanded to be reinstated, under the rules contained in regulation 49, 1793, concerning forcible ejectment. The defendant alleged, that the plaintiff had never been in actual possession of the villages, and consequently denied the alleged dispossession. He stated that the *pergunna* Sahis, in which the villages are situated, was purchased at public auction by himself and another; and that they were put into possession by the Collector of the district. The defendant further stated, that the plaintiff could have no right or title under any sale made to him by Ranee Unpoorna in 1208, as he could prove that all *birt* lands formerly held by the Ranee, were resumed several years before, at the decennial settlement of the *pergunna*. There did not appear to the Zillah Judge any proof that the defendant had been put into possession of the villages in question by the Collector's officers. From the testimony of witnesses for the plaintiff it was considered to be proved, that the plaintiff was in possession from the beginning of *Srawun* to *Poos* 1210, and in the latter month was forcibly dispossessed by the defendant. A summary judgment was therefore passed in the Zillah Court for the plaintiff's being reinstated in possession, with costs against the defendant.

On an appeal preferred by the defendant from the above decision to the Provincial Court of Calcutta, upon the plea that the case did not come under the regulation relating to forcible ejectment, the Provincial Court did not believe the evidence respecting Ramdhun Rai having been in possession, and having been dispossessed by the other party; and considered the plea on which the appeal was brought to be valid. The Court were chiefly led to reject the evidence for the claimant, from its appearing to them that he could have no title to possession under the sale stated to have been made to him by Ranee Unpoorna, as the whole of the Ranee's *birt* lands had evidently been resumed long before the date of the sale, so that the Ranee could have had no power to transfer the villages to the claimant. The Provincial Court re-

Claim by the appellant to recover possession of certain lands from the respondent, on the plea of forcible ejectment. On proof of the fact, judgment for his being reinstated. The respondent left to try the question of right in a regular suit.

1806.

Ramdhun
Rai, v.
Bishennath
Bose.

versed the summary decision passed in favour of the claimant by the Zillah Judge, and decreed that the other party should remain in possession.

On appeal by the claimant from the above decision to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), it was shown that the villages were actually bought by the appellant, as stated by him, from Ranee Unpoorna, two years previously to the public purchase of pergunna Sahis by the respondent, and that the Collector did not give the respondent possession of them, but only of the rest of the pergunna. The Sudder Dewanny Adawlut considered it established by the evidence, that the appellant was in possession of the villages in 1210, under the sale from the Ranee, and was forcibly dispossessed by the respondent; and the Court therefore overruled the opinion of the Provincial Court of Appeal, respecting the provisions of regulation 49, 1793. not being applicable to the case. A final order was accordingly passed for affirming the summary decision of the Zillah Judge, and reinstating the appellant in possession of the villages, leaving the respondent to bring a regular action to try the question of right, if he considered that the sale by Ranee Unpoorna to the appellant was illegal (as in the Court's opinion it probably was), and that the villages were included in his public purchase of pergunna Sahis. The costs in each of the Courts were adjudged against the respondent.

1806.

Feb. 10th.

SHEWA DAS, Appellant,

versus

BISHENNATH DOBEE, Respondent.

Claim by the respondent to half the value of a diamond, of which his late father was joint proprietor with his uncle, and which the latter had pawned to the appellant. The pledge not admitted to affect the respondent's right, and judgment given in favour of his claim.

THIS was an action brought by Bishennath Dobee, in the City Court of Benares, on the 2nd of July 1802, against Shewa Das and another, named Hurripershaud Dobee, for the recovery of half the value of a diamond, estimated to be worth 70,000 rupees. The claim on the part of the plaintiff was in right of inheritance from his deceased father, Bhobindur Dobee. It appeared, that the plaintiff's father, and Hurripershaud, his uncle, succeeded to a joint estate, of which the diamond in question formed a part; that the value of it was not divided between them with the rest of the estate: but that it was deposited with Hurripershaud as the joint property of the brothers. Hurripershaud, however, had pawned the diamond with the defendant Shewa Das; and there had been a previous law-suit between the defendants, in which Shewa Das had obtained a judgment for a balance due on the pledge. It was stated by the plaintiff, in the present case, that the diamond was pawned by Hurripershaud without the knowledge or consent of the plaintiff's father, the joint proprietor of it; and that the action brought on the pledge had arisen from collusion between the two defendants, with an intent to defraud the plaintiff of his half share of the value. The plaintiff, therefore, alleging the pledge to be illegal, required the diamond to be sold in satisfaction of his her-

ditary claim, in preference to its being applied to satisfy the claim of the pawnee. The defendant, Hurripershaud, did not deny that the diamond had been the joint property of the plaintiff's father and himself, but denied that the pledge was illegal, alleging, that the money raised on it was for the purpose of discharging debts due from the joint estate, and that they were discharged with the money so raised. The other defendant, Shewa Das, alleged, that the diamond was pawned to him by Hurripershaud as his sole property; that he received it as such; and that his right under the pledge could not be affected by any claim on the part of the plaintiff. The City Judge admitted the plaintiff's claim, in right of his father, to have the value of the diamond, as having been the joint property of his father, and pawned without his father's concurrence; but at the same time expressed a suspicion, that the present action had proceeded in a great measure from collusion between the plaintiff and the defendant Hurripershaud, with a view to preclude the defendant Shewa Das from recovering money which he had advanced on the pledge, and which had been adjudged to him by a previous decree of the Court. It was therefore decided, that the value of the diamond should be realized by public sale in the Court, and that a sum, equal to half the value so realized, should be recovered by the plaintiff from the defendant Hurripershaud; but it was provided, that the proceeds of the diamond should, in the first instance, be applied to the satisfaction of the former judgment, in favour of the defendant Shewa Das; the surplus, if any, falling to the plaintiff in part of the present claim; and the remainder being made up to him from any other assets of the defendant Hurripershaud. The costs were directed to be paid by the plaintiff and Hurripershaud jointly.

1806.

Shewa Das,
v. Bishen-
nath Dobee.

On appeal by the two defendants from the above decision to the Provincial Court of Benares, that Court concurred in the admission of the claimant's hereditary right to half the value of the diamond, but did not concur in the decision passed on the case by the City Judge, upholding the validity of the pledge in preference to the hereditary claim. On a reference by the Provincial Court to its Hindoo law officers, it was ascertained, that under the Hindoo law, the pledge having been given without the consent of one of the joint proprietors, was invalid as far as related to that proprietor's share in it; and it was moreover evident to the Court, that Shewa Das, who was a jeweller in Benares, where the diamond in question was well known, must have been aware, when he accepted the pledge, that Hurripershaud was not the sole proprietor. It was presumable, therefore, that there was fraud in the transaction. And it being the opinion of the Provincial Court, that the claimant was entitled to recover half the value of the diamond from the proceeds of the sale, and that the remaining half, only, could be appropriated to the satisfaction of the former decree in favour of Shewa Das; the decree of the City Judge was amended, and judgment given accordingly by the Provincial Court. The costs in the City and Provincial Courts were made payable by Shewa Das and Hurripershaud. It was at the same time provided, by a clause in the decree, that, if it should actually appear that Hurripershaud had paid off, with money

1806. raised by pawning the diamond, debts due from the joint estate, which fell to himself and the father of the claimant, he might bring a separate action against the claimant for his share of such debts. *Shewa Das, v. Bishen-math Dobee.* On a further appeal by Shewa Das to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), it appeared, on the admission of the appellant, that the debt for which the diamond was pawned to him by Hurripershaud, was a personal debt due from the latter, unconnected with any claims on the joint estate; and as the Sudder Dewanny Adawlut was of opinion, with the Provincial Court, that the transaction between the parties to the pledge could not affect the respondent's share in the property of the diamond; the decree passed by the Provincial Court in favour of the claim was confirmed, and the appeal dismissed with costs.

1806. SHEO-DEAL RAI, and others (Sons of PREM RAI, deceased),
 Paupers, Appellants,
 Feb. 24th. *versus*
 DHUNPUT RAI, *Gomashita*, (on the part of the banking-house of
 THAKOOR DAS and GOVIND DAS), Respondent.

Claim by the father of the appellants, to recover certain lands sold to the respondent by one of the claimant's sons, on the plea that the son's act was not authorized. The contrary appearing from circumstantial proof, judgment given against the claim.

THIS was an action brought by the late Prem Rai, in the Zillah Court of Sarun, on the 4th of March 1802, to recover from the persons of whose banking-house Dhunput Rai was *Gomashita*, a village called Puchtukee Judoo, held on a free tenure under the title of *nankar*; and also to recover from the defendants the profits realized from the village during a period of alleged illegal possession. The annual produce of the village was estimated at 1,505 rupees. It appeared, that on the 15th of *Kartik* of the *Fusslee* year 1198, corresponding with the 6th of November 1790, deeds of *bye-bil-wufa*, or mortgage and conditional sale, redeemable within eight months, were executed to the plaintiff on the villages in question, for a debt of 2,100 rupees. The period expired without the mortgage being redeemed, and the sale in consequence became absolute. The deeds were sent to Chupra by the plaintiff, in charge of his son Jooba Rai, who, being there arrested for an arrear of revenue due from other lands, transferred to the defendant the *bye-bil-wufa* sale, with the deeds and papers connected with it, for the sum of 2,105 rupees, reserving an option of redeeming the transfer within fifteen days. A written engagement was at the same time executed by Jooba Rai, to give the defendant possession of the village, if the money advanced were not repaid within the time agreed on. Jooba Rai neither repaid the money nor gave possession of the lands; in consequence of which the defendant brought an action for possession, under the engagement, and obtained a judgment, on the 19th of September 1793, under which he had since held the village. The plaintiff, in the present action, sued to recover the village, alleging, that the purpose of his sending the deeds to Chupra in charge of his son Jooba Rai, was to obtain an order from the Collector to put him into possession of the village; that the son was not authorized to transfer the deeds, but did it without the plaintiff's knowledge or con-

sent; that he was induced, by collusion between the defendant and the Collector's *Dewan*, to enter into the written engagement, when arrested for the arrears; which written engagement the plaintiff asserted to be illegal and of no avail. The defendant pleaded, 1st, that the transaction was perfectly fair, and not without the sanction of the plaintiff; 2nd, that the former judgment must bar the present claim. It did not appear, from the record of the former trial, that any objections against the judgment had been then offered by the present plaintiff on the ground of the written engagement not having been authorized by him; and as the Zillah Judge was of opinion that the former judgment had determined the merits of the case, and that it could not be again brought forward, the plaintiff's claim was dismissed in the Zillah Court, with costs recoverable from any property which might hereafter be found in his possession.

1806.

Sheo-deal
Rai, v.
Phanput
Rai.

On appeal by the plaintiff to the Provincial Court of Patna, that Court confirmed the decree of the Zillah Judge, more especially from its appearing, that, although the transaction between Jooba Rai and the respondent took place nearly nine years before the present suit was instituted, no previous steps had been taken by the appellant for setting aside the engagement then executed by his son; from which it was inferred, that the transaction took place with the appellant's concurrence.

The appellant having died in this interval, was succeeded by his sons, who under his right and interest in the cause, preferred a further appeal to the Sudder Dewanny Adawlut (present J. H. Harrington and J. Fomelle). This Court concurred in the opinion, that as no objection had been offered on the part of the father of the appellants, against the former judgment, by which possession was decreed to the respondent, and no appeal from it had been preferred during the long period which had elapsed since it was passed, it was inferrible, that the transaction, concluded with the respondent by Jooba Rai, respecting the transfer of the *bye-bil-wusa* purchase, took place with the sanction of his father; and the former judgment, founded on that transaction, was held to be conclusive against the present claim. The decrees passed against the claim, by the Zillah and Provincial Courts, were in consequence finally confirmed by the Sudder Dewanny Adawlut, with costs recoverable from the appellants, in the event of property being found in their possession.

1806.

RADIHAKISHEN RAI, and others, Appellants,

versus

March 17th.

RAMMOHUN RAI, Respondent.

Claim by a zemindar for rent of lands, alleged by the tenants to be rent-free. Rent of part of them, found to be due to the zemindar, adjudged. Claim to rent of the remainder rejected, the amount of assessment to which they are liable, being receivable, under the regulations by government, at the suit of the collector.

THIS was an action brought by Rammohun Rai in the Zillah Court of Hooghly, on the 15th of November 1799, or 2nd of *Aghun* of the Bengal year 1206, to recover from Radhakishen and others, heirs of the late Ramkishen Rai, the sum of 874 rupees, as rent, for part of 1206, of about 501 beegas of land at Tarahath, in pergunnah Govindpoor, of which the plaintiff was zemindar. It was set forth in the plaint, that Ramkishen Rai farmed the mouza Tarahath from the Bengal year 1193 until his decease, which happened a short time before the date of the action; that, during the period of his farm, he illegally assumed, as a free tenure, in the names of some of his relatives, three portions of land, amounting together to the extent specified in the claim; that, in the beginning of the current year, the plaintiff purchased the pergunna in which the lands are situated, and demanded the rent of them from Ramkishen Rai, which he refused to pay, and of which the defendants also refused payment. The defendants alleged that the lands were legally held by them on a free tenure under *lakhiraj* grants of *dewattur* and *mohatteran*, from former zemindars, and that they had held them independently of Ramkishen, prior to his decease. The Zillah Judge deputed an *aumeen* to the spot, and it appeared from his report, corroborated by evidence, that the lands were subject to the payment of rent in 1193, when the farm of the late Ramkishen commenced; and that he alienated the greater part of them from the rental at the commencement of his farm, under pretence of a *sunnud* for the superintendant of the *bazee zumeen duffer* (an office formerly established by government for the investigation and registry of *lakhiraj* grants) confirming prior grants for holding them on a free tenure. This *sunnud*, as produced in Court by the defendants, and alleged by them to be genuine, was in favour of Ramkishen, as head of the family, dated the 17th of February 1787, corresponding with the beginning of the Bengal year 1193, and purporting to have been given by Mr. Young, the officer superintending the *bazee zumeen duffer*. But the name of Mr. Young on this *sunnud* did not appear to correspond with that officer's signature on other authentic papers; and there was an inconsistency in the number of it (1183) compared with that of another authentic *sunnud* (1690), dated only a few days after it, which, considering the small number of *sunnuds* usually issued at the time, was not at all likely to have been granted at so great an interval in the numerical order. The Zillah Judge therefore rejected the document as not genuine. It was his opinion, that there was no title for any of the lands being held on a free tenure; and as the rent, for the part of the year 1206, to which the claim extended, was, according to the *aumeen's* valuation, 950 rupees; this sum was declared recoverable by the plaintiff from the defendants; and judgment was given accordingly in the Zillah Court, with costs against the defendants; an option being at the same time left to them to have

another valuation made, if they objected to the rate of the valuation reported by the *aumeen*. 1806.

On appeal by the defendants from the above decision to the Provincial Court of Calcutta, that Court concurred in the zillah decree, and affirmed it, with costs against the appellants, and with interest on the amount adjudged, to the date of the decree in appeal. Radhakishen Rai and others, v. Rammobun Rai.

On a further appeal to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington), the *sunnud* produced by the appellants before the Zillah Judge, in support of the alleged right to the lands, being still affirmed by them to be genuine, and to afford proof that the lands had been duly granted as *lakhiraj*; the Court, in order to ascertain the fact, obtained from the records of the Board of Revenue the original documents of the *buzes zumeen duffer*. No trace of the *sunnud* appeared in this register; and the number on the *sunnud* answered in the register to an entirely different *sunnud* for other lands. The *sunnud* in question was therefore finally rejected; and it was pronounced by the Sudder Dewanny Adawlut, after the inspection of other documents and papers produced in the case, that there was no proof of any right, under a competent grant, to hold the lands in question exempt from revenue. But under the rules contained in section 7 and 11, of regulation 19, 1793, which direct that the assessment of lands, exceeding the quantity of 100 beegas, held exempt from the payment of revenue, under incompetent grants, previously to the 1st of December 1790, shall belong to Government, and be recovered, not at the suit of the zemindar, but of the Collector on the part of Government, it was the opinion of the Sudder Dewanny Adawlut that the respondent could not maintain his whole claim to the rent of the lands in question. With the exception of about 100 beegas, termed the "*Jote of Mudun Rai*," and rated at the rent of 415 rupees, which were ascertained, and also admitted by the appellants before the Sudder Dewanny Adawlut, to have been always assessed till within a short time before the present suit, it appeared clearly to the Court, that the remainder of the lands in question had been held exempt from assessment, by the late Ramkishen, or by persons of his family, under grants from zemindars of the pergunna, previously to the date specified in the regulation cited; and it was therefore pronounced, that, though they were resumable, as having been alienated from the rental, by incompetent authority, since 1765. (the date of the Dewanny) the respondent was not the person authorized to claim the revenue of them. The Court, therefore, rejected the claim of the respondent to rent for these lands, and only admitted his right to 415 rupees, as rent due, in 1806, on the quantity of one hundred beegas, which were ascertained not to have been held on a free tenure on or before the 1st of December 1790. The decrees of the inferior courts were accordingly amended, and judgment given for the respondent recovering this sum from the appellants, with interest from the date of the zillah decree. The costs in each of the courts were directed to be paid by the parties respectively.

1806.

May 2nd.

PUDUM NATH RAI, Appellant,

versus

RANEE JUDESREE, Respondent.

Claim by the respondent to possession of lands, as having been purchased on her account and with her money, her name, having furnished him with money for the purpose; that by the appellant, which the appellant denies. Judgment for the respondent, on the appellant's written acknowledgment of the fact.

The validity of an instrument upheld, to which a surreptitious addition, purporting that it was void, had been made by the subscribing party.

THIS was an action brought by Ranee Judesree in the Zillah Court of Dinajpore on the 16th of March 1801, or 5th of *Cheit* of the Bengal year 1207, to recover from Pudum Nath Rai possession of pergunna Aligaon and other lands, the annual produce of which was estimated at 2,803 rupees. It was set forth in the plaint, that, on the lands in question being advertised for public sale in *Asin* 1206, for the recovery of arrears of the public revenue, the plaintiff deputed the defendant, as her agent, to purchase them in her name, having furnished him with money for the purpose; that the defendant, however, thought proper to purchase them in his own name, with the plaintiff's money, and to give himself out as the real purchaser, though he was afterwards induced to give the plaintiff possession, and to execute an acknowledgment in writing, admitting that the purchase was made on her account; that he had since, however, illegally deprived her of possession, which she brought the present action to recover. The defendant alleged that the lands were his property, and that he purchased them for himself, with money borrowed for the purpose. He produced a bond, purporting to have been given by him to a banker of whom the purchase money was borrowed. No proof was brought in support of it. The plaintiff, on the other hand, produced two documents decisive on the case. The first was, the written acknowledgment of the defendant (as stated in the plaint), bearing date the 22d of *Kartik* 1206, and acknowledging that he purchased the lands for the plaintiff; that they were the plaintiff's property; and that she was at liberty to have her name substituted in the registry, as proprietor, whenever she chose. After the defendant's signature to this paper, there appeared the word *nakis*, or defective. The defendant accordingly did not deny the instrument, but denied its validity. The account he gave of its execution was improbable, and unsupported by proof, viz. that he had been persuaded to execute it, from respect to the plaintiff's family, on the verbal promise of the plaintiff's son, Nubkishen, to indemnify him; and that he therefore wrote on it the word *nakis*, to show that no authority was to be attached to it. From the evidence, however, of the subscribing witnesses, it appeared that the defendant, at the time of executing the paper, declared it to be binding, as well as voluntary on his part; and that the word *nakis* was not observed by them on the paper when they attested it. The plaintiff indeed stated it to have been surreptitiously added; and the Zillah Judge, to whom it was evident that it had been added with an insidious intention of invalidating the instrument, held that it was of no effect against its validity. The second document, which fully corroborated the former one, and which, independently of it, might have been sufficient evidence of the justice of the claim, was a receipt of the defendant for the sum of 6,987 rupees, advanced to him by the plaintiff for the purchase of the lands in question on her account. The defendant denied this receipt, but it was fully

proved. It being the opinion of the Zillah Judge that the defendant, without any title to the lands in question, had been endeavouring, by an evident fraud, to deprive the plaintiff of them; and that they were the plaintiff's property under the purchase made on her account at the public sale; judgment was given for the plaintiff in the Zillah Court, for the recovery of them, with costs against the defendant. 1806.

Pudum
Nath Rai,
v. Rancee
Judeesree.

On appeal by the defendant from the above decision to the Provincial Court of Moorshedabad, and finally to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), those Courts respectively concurred in the zillah decree, and confirmed it, with costs against the appellant, and with an order that the profits realized from the lands by the appellant during the time he had been in possession, should be refunded to the respondent. (a)

RAJA GRISCHUND RAI, Appellant,

1806.

versus

SUMBHOCHUND RAI, Respondent.

May 9th.

THIS was an action brought by Sumbhoochund Rai, in the Claim by Zillah Court of Nudden, on the 23d of May 1804, or 12th of *Jeth* the respondent of the Bengal year 1211, against Grischund Rai, a minor (his appellant guardian being joined with him in the suit), for the recovery of for arrears 40,808 rupees, as arrears of an annuity. The plaintiff was one of of an annuity. the younger sons, and the defendant the second in descent from On proof of the eldest son of Rajah Kishenchund, formerly zemindar of Nud- the right to dea. In the time of Raja Kishenchund, the zemindar had been the annu- held *khas*, or under the immediate management of the officers ofty under Government, a *moshakira*, or allowance in consideration of his pro- former prietary right, amounting to two lacks of rupees *per annum* being judgments, received by the Raja from Government, in lieu of the profits of his arrears de- and of the zemindar. The Raja, before his decease, not wishing his estate mandated be- ing unpaid, to be divided among his family, settled it on his eldest son, by a judgment will dated in the Bengal year 1187, with the condition that certain in favour of annuities should be paid to the younger sons for their support, the claim. out of the *moshakira*, or allowance made by Government to the Punctual proprietor. The eldest son, on the zemindar's death, succeeded payment of the annuity to be accordingly to the estate, as sole proprietor. The amount of the annuity to be plaintiff's annuity under the will (payable by monthly instalments), enforced being originally 15,000 rupees, but on the occasion of a reduction in future being made by Government in the proprietor's allowance, which without a was higher than the usual proportion, had been settled, with the new suit. the plaintiff's acquiescence, at 12,000 rupees. The father of the defendant (or grandson of Kishenchund), who succeeded on the decease of the eldest son, entered into engagements with Government for the revenues of the estate, and took it into his own management, with-

(a) The artifice practised by the defendant (and appellant,) who privately added to his signature a short declaration of the invalidity of the document, did not avail against the evidence of his acknowledgment. His signature to the document was taken, by all the Courts, in the sense in which it was understood by the other party and witnesses, and in which he gave it to be understood, at the time of his affixing it.

1806.

Raja Gris-
chund Rai,
v. Sum-
bhoochund
Rai.

out reference to the consent or concurrence of the annuitants. The estate had now devolved on the defendant; but it had by degrees considerably declined in value, in the hands of his father, and since his own succession; many of the lands having been sold for arrears of revenue. In the present action, the plaintiff stated, that in a former suit against the defendant's father, he had recovered arrears of the annuity in question up to the beginning of *Srawun* 1207, from which time to the end of *Bysakh* 1211, a period of three years and nine months, there was due from the defendant, as proprietor of the zemindaree, the sum of 45,000 rupees; of which the plaintiff had received only 4,192 rupees; leaving the amount demanded, due from the defendant. The defendant did not question the conditions of Raja Kishenchund's will, but pleaded, that the plaintiff's annuity was fixed at 12,000 rupees, when the zemindaree was entire and productive; that now, in consequence of the large portion of lands which had been sold for arrears, there were no assets to pay so large an annuity; and that it ought to be reduced in proportion to the decay of the estate. The defendant also alleged, that, of the sum demanded by the plaintiff as arrears, 12,250 rupees had been paid to him. This, however, was denied by the plaintiff; and the defendant adduced no proof of it. From the record of the former cause, respecting arrears of the annuity in question, decided in the Zillah, on the 6th of April 1801, and afterwards confirmed in appeal by the Provincial Court of Calcutta and by the Sudder Dewanny Adawlut, it appeared, that the plea now offered by the defendant, with respect to a reduction of the annuity in proportion to the decrease of the estate, had been then offered, and rejected by the several courts; the grounds for whose decision were, that, as the father of the present defendant, instead of continuing the estate under the management of the officers of Government, and of receiving the *moshakira*, which was the fund expressly destined by the will of Kishenchund for the payment of the annuities, and which, under the option given to proprietors of estates, might, at the rate ultimately fixed, have been continued undiminished to this day, chose, without the privity and concurrence of the annuitants, to take the estate into his own management, it was not just that the annuitants, who would not have participated in any eventual profit accruing from the measure, should be liable to suffer by any contingent loss; that, therefore, the circumstance of the estate having decreased in value, from mismanagement on the part of the proprietor, ought not to be allowed to affect the amount of the annuities; and that the payment of the whole amount of them (under the condition with which the estate was settled on the elder branch of the family), was demandable by the annuitants. In the present case, therefore, the Zillah Judge observed, that there could be no question respecting the plaintiff's right to the whole of his annuity, and that the only point to be decided, was the exact balance of arrears remaining to be paid. And as, with the exception of the sum of 4,192 rupees, which the plaintiff admitted having received, no other payments were proved by the defendant, it was determined, that the balance demanded was recoverable by the plaintiff, and judgment was accordingly given in his favour in the Zillah Court with costs against the defendant.

On appeal by the defendant from the above decision to the Provincial Court of Calcutta, and afterwards to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), those Courts respectively concurred in the zillah decree, and confirmed it, with costs against the appellant, and interest on the amount adjudged. And as the respondent's right to the annuity, for life, had been adjudged to him by two decisions; and the appellant, in the present case, appeared to have appealed from the decision of the Zillah Court merely to protract the period of payment: it was further ordered by the Sudder Dewanny Adawlut, that the Zillah Judge, in carrying the decree into execution, should cause the arrears to be paid to the respondent up to the present date; and that he should (if necessary) enforce its punctual payment in future by sale of the appellant's lands.

RANEE BHUWANI DIBEH, and RANEE MAHAMAYA DIBEH, Appellants,

1806.

versus

May 12th.

RANEE SOORUJ-MUNEE, Respondent.

THIS was an action brought by Bhuwani Dibeh and Mahamaya Dibeh in the Zillah Court of Rajshahy, on the 16th of August, 1799, or 2nd of Bhadon of the Bengal year 1206, against Ranees Sooruj Munee, for the possession and zemindaree right of a share of lands denominated Turuf Gopalpore. The annual produce of the whole was estimated at 50,842 rupees. The parties were allied by marriage in the same family, as shown in the following sketch:

ANOOP NARAFN,
Zemindar of Luskurpoor, left four sons.

1st,	2d,	3d,	4th,
Nurindur Naraen, succeeded to a quarter, augmented, by consent of his brothers, to 5½ anas.	Modh Naraen, succeeded to a quarter, reduced to 3½ anas—died in 1175, leaving four sons, viz.	Roopindur Naraen, 3½ anas, ditto—died in 1180, without issue.	Pran Naraen, 3½ anas, ditto.
1st, Luckhi Naraen, husband of plaintiff, Bhuwani Dibeh, died in 1185.	2d, Mahindur Naraen, husband of plaintiff, Mahamaya Dibeh, died in 1188.	3d, Rubindur Naraen, died in 1203, at Bindrabun.	4th, Rajindur Naraen, shares of husband of defendant, adopted by estate, of Roopindur, and which succeeded to his shares, 3½ anas.

The 3½ ana share of the zemindaree, claimed by the plaintiffs, was the division which had formed the estate of Modh Naraen. They claimed it in right of their husbands, and of Rubindur Naraen, their husband's brother; these three persons being stated by the plaintiffs to have been the joint successors to the estate of Modh Naraen; as his fourth son, Rajindur, was excluded from a share in the succession, having been adopted by his uncle Roopindur, whose estate he inherited. The plaintiffs affirmed, that several of the

Raja Griachund Rai, v. Sumbhoochund Rai.

Claim by the appellants to a 3½ ana share of an estate. Two-thirds of the share adjudged to them, in right of their deceased husbands; and the remainder of the claim dismissed. Members of a Hindoo family, entitled, as heirs, to shares of the family estate, of which Roopindur, and which succeeded to his shares, 3½ anas. however, sixteen years, they never demanded separate possession, but allowed them to remain,

1806. sharers in the zemindaree (among whom were the late proprietors of the share in question), had kept their shares joint and undivided, the management being entrusted to some one person of them; and that 10½ anas of the zemindaree (consisting of 3½ anas, the share of Pran Naraen; 3½, the share in question; and 3½, the share of Rajindur, in right of his uncle, who adopted him), were managed by the husbands of the plaintiffs successively, until the periods of their decease; that the management then devolved on Rubindur Naraen; and that, soon afterwards, in 1189, Pran Naraen withdrew his share, so that there remained in the hands of Rubindur Naraen only 7 anas, consisting of the share in question, and the share of Rajindur; that Rubindur Naraen, while holding these 7 anas as manager, went on a pilgrimage to Bindrabun in 1202, accompanied by Rajindur, and died there in the following year; and that Rajindur, on his decease, unduly took possession of the 7 anas, and, on the demand of the plaintiffs, refused to give up to them the share to which they were entitled. That part of the claim of the plaintiffs which related to Turuf Gopalpoor, was preferred by them on the ground that the Turuf had been purchased by Rubindur Naraen, while manager of the 7 anas, with money belonging to the plaintiffs. The defendant wholly denied the claim of the plaintiffs. She alleged, first, that the pretended purchase of Turuf Gopalpoor with the plaintiffs' money, was unfounded; second, that the plaintiffs, from the time of the decease of their husbands to the death of Rubindur Naraen at Bindrabun, never held any share of the estate, but merely received a settled provision; third, that when Pran Naraen withdrew his share from the joint estate in 1189, the plaintiffs were called upon as sharers in the estate, for their portion of the expense incurred on the occasion, but refused to contribute towards defraying it, declaring themselves to have relinquished all concern with the estate, as sharers, and merely to desire a maintenance from it as members of the family; fourth, that Rubindur Naraen, when on the way towards Bindrabun, made a verbal gift of the share in question, and of Turuf Gopalpoor, the whole being his own property, to Rajindur, the husband of the defendant, who went with him on the pilgrimage, and afterwards confirmed the gift by a written deed, about two months before he died. The deed of gift set up by the defendant, bearing date the 21st of *Chey* 1203, was produced in Court. The subscribing witnesses, on account of the distance of their residence, were not summoned for examination; but as several witnesses for the defendant deposed to their having heard Rubindur Naraen signify his intention of making the gift contained in it; and as the deed, besides having the usual seal of the *cuzee* of the district (the regular officer for attesting deeds), bore three English signatures; the Zillah Judge believed the deed to be a genuine instrument, and admitted it in evidence for the defendant. As it did not appear that the plaintiffs had within twelve years, possessed or claimed shares of the zemindaree; and as the Zillah Judge was of opinion, that, by the deed of gift, Rubindur Naraen had transferred to the husband of the defendant the proprietary right of the disputed share of the zemindaree, and of the Turuf Gopalpoor; it was pronounced, that the claim of the plaintiffs could not be maintained, and

with other parts of the estate, under the general controul and management of another of the sharers, (a member of the family) and received a provision in land for their expenses, not debared from claiming possession of the shares, it not appearing that they ever consented to relinquish their right as sharers.

judgment was accordingly given against them in the Zillah Court, with costs; provision being at the same time made for their continuing to receive a maintenance from the estate, as members of the family.

On appeal by the plaintiffs from the above decision to the Provincial Court of Moorshedabad, that Court concurred in the zillah decree, and confirmed it with costs against the appellants.

On a further appeal to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), this Court did not concur in the above decisions. With respect to that part of the claim of the appellants, which related to Turuf Gopalpore, as having been purchased with their money by Rubindur Naraen, the Court allowed that there was no proof of the fact, and that it could not be admitted. But with respect to the zemindaree, it appeared to the Court that the $3\frac{1}{2}$ ana share which had formed the estate of Modh Naraen, devolved, at his death, on his three elder sons, in equal shares, the fourth son being excluded from a share in the succession, as having been adopted by his uncle, and having succeeded to his estate; and the Court considered the appellants (the widows of the first and second sons) to be the persons entitled to succeed to the shares of their husbands respectively, though not to the share of Rubindur Naraen, their husband's brother, who died long after their husbands, and to whose property they could have no title. The only question appeared to the Court to be, whether the appellants had relinquished their right to the shares of their husbands. It had been admitted by the respondent, in her answer in the Zillah Court, that, in 1189, when Pran Naraen separated his share of the estate from the rest, the appellants were proprietors of the shares of their husbands; and it was alleged by the respondent, that the appellants, when called upon on that occasion for their proportion of the joint expense, relinquished their shares, on condition of receiving a maintenance. This, however, was denied by the appellants, and the respondent produced no proof of her assertion. The circumstance of the appellants having received the profits of certain lands forming part of the estate, instead of an annual dividend on a settlement of accounts with the manager, appeared to have been in conformity with the custom of the family, and was not considered to demonstrate any relinquishment of their title as sharers, in favour of the manager, Rubindur Naraen. Indeed it was evident that the manager had exercised the same controul with respect to the share of Rajindur, as with respect to those which had belonged to the husbands of the appellants; yet it was not pretended that he had any right of property in Rajindur's share. It appearing therefore to the Court, that the appellants never relinquished their title to the shares of their husbands, and were all along actual proprietors of those shares, it was pronounced that the manager, Rubindur Naraen, could have had no legal power to alienate them, by gift, or in any other manner. The deed of gift produced by the respondent in the Zillah Court, stated to have been executed by Rubindur, and under which a judgment was given in the Zillah Court against the claim of the appellants, was considered by the Sudder Dewanny Adawlut, from suspicious circumstances which appeared respecting

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1806. it, to be inadmissible on the evidence yet adduced in support of it, and the Court observed, that, in the event of the deed being proved by further evidence, whether that of the attesting witnesses, or of the *cazee* before whom it was executed, it would only entitle the respondent to the share of Rubindur, in preference to the heirs of that person, and that it could not in any degree affect the shares of the appellants, derived from their husbands, of which Rubindur was not held to have been proprietor. Previously, however, to a judgment being passed on the case, the Court, at the desire of the respondent, made a reference to their Hindoo law officers, and, after stating to them the circumstances of the case, (*viz.* that Rubindur Naraen, a sharer in the zemindaree, for a period of 16 years, had the sole management of a considerable part of the zemindaree, including the shares of the husbands of the appellants, during which time the appellants, as had been customary with other sharers in the estate, were in possession of lands allotted for their expences, without demanding the specific shares of their husbands, or an account of the specific profits of those shares; which, moreover, were registered in the name of the manager; but the right to which was not proved to have been ever relinquished by them;) the law officers were asked, whether the circumstance of the appellants having suffered the claim to remain unagitated for so long a time, involved, under the Hindoo law, a forfeiture of their title to shares in the joint estate? The answer to this reference was, that "as the appellants did not separate themselves from the managing sharer, or consent to relinquish the shares of their husbands, the title to the shares has not lapsed. Though a person have possession of his kinsman's share of an estate for sixteen years, the kinsman's right does not cease on that account. If the appellants claim possession of their husbands shares, the claim is good." The decrees of the Zillah and Provincial Courts were accordingly reversed, in part, by the Sudder Dewanny Adawlut; and of the $3\frac{1}{2}$ ana division, formerly the estate of Modh Naraen, two-thirds, as the portion of his two elder sons, the husbands of the appellants, were adjudged to the appellants, in right of their husbands. The Court dismissed their claim to the remaining third, which, it was observed, would be the property of the respondent under Rubindur's deed of gift in her husband's favour, in the event of that deed being hereafter proved; or, if it were not proved, would be divisible among Rubindur's heirs. The dismissal of one-third of the claim of the appellants, subjected them to a proportional payment of costs in each of the Courts; but it appearing that the appellants had been dispossessed, during the years 1211 and 1212, of certain private lands, of which the profits in those years, realized by the respondent's husband were equal to the proportion of costs for which the appellants were responsible, it was directed by the Sudder Dewanny Adawlut, that the respondents, instead of accounting for those profits, should pay the whole costs in each of the Courts.

Ranee
Bhuwani
Dibeh and
Ranee
Mahamaya
Dibeh, v.
Ranee
Sooruj-
munee.

DYARAM, Appellant,
versus
 BHOBINDUR NARAEN and BUNCHANUND DAS,
 Respondents.

1806.
 June 9th.

THIS was an action brought by Dyaram, in the Zillah Court of Claim of Mymensing, on the 25th of June 1797, or 14th of *Asarh* of the the appel-
 Bengal year 1204, to recover from BhoBindur Naraen and Bun-
 chanund Das, the talookdary right of Turufs Khitulbauty and talookdary
 Duryjhompna, the *jumma* of which was stated to be 2,086 rupees. right of
 These lands were situated in pergunnah Pokhurya, which was certain
 sold at auction in the Bengal year 1200, on account of arrears due lands in the
 from the former zemindar, and was purchased by the defendants. zemindaree
 The defendants shortly afterwards turned out the plaintiff, and of the res-
 gave a lease of the lands to another person. The plaintiff claimed pondents,
 the right of holding them as a talook, at a fixed *jumma*, alleging not proved,
 that his father, under whom he claimed, purchased the proprie- and dis-
 tary of the lands, and that the late zemindar had acknowledged missed.
 that right. The defendants denied that any such purchase had But, on
 been made, or that the plaintiff had any title to hold the lands at proof of a
 all. From several of the zemindaree papers, it appeared, that the right to
 lands had been long held on lease by the plaintiff's family; and hold the
 three writings of the late zemindar were produced in evidence by lands as a
 the plaintiff, dated about five years prior to the sale of the per- *mouroosy*
 gunnah, and containing orders from the zemindar to certain of the *ijarah*, or
 zemindaree officers, that the *jumma* of the lands in question should hereditary
 not be raised, and alluding, at the same time, to an intended sepa- leasehold,
 ration of them from the estate, as the talook of the plaintiff's at the cus-
 father. From these it was inferred by the Zillah Judge, that the tomary rent
 late zemindar had relinquished to the plaintiff's father the talook- of the per-
 dary right of the lands; and as the defendants, the present zem- gunnah,
 indars, were entitled to no more than the rights of the former one, judgment
 it was considered that the defendants could not preclude the plain- given ac-
 tiff from holding the lands as his talook. Judgment was therefore cordingly.

On appeal by the defendants (the zemindars), from the above-
 decision to the Provincial Court of Dacca, that Court did not
 concur in it, for the reasons which follow: from the evidence of
 the witnesses who proved the signature of the late zemindar to
 the letters on which the Zillah Judge grounded his decision in
 favour of the claimant, and who stated themselves to have been
 acquainted with the circumstances under which those letters were
 written, it did not appear that they were written in consequence
 of the claimant's talookdary right being ascertained, but that they
 were given on representations made by the claimant, which the
 zemindar might afterwards have found to be incorrect, and have
 objected to the measures grounded upon them being carried into
 effect. And as it did not appear that any steps had been taken
 respecting the separation of the lands, or the registry of them as
 the talook of the claimant's father, the Provincial Court did not
 consider that these letters could afford any legal proof of the

1806. alleged talookdary right. Evidence adduced by the claimant as to the alleged purchase of his father, did not prove the fact; and there was no trace of the lands being the talook of the claimant, or his father, in any of the zemindaree papers. On the contrary, it appeared from authentic records in the office of the Canoongo, that the lands were there registered as having been all along the *nij-talook*, or private lands of the former zemindar. The Provincial Court, therefore, considering the lands to be the property of the present zemindars, under their purchase of the estate, overruled the opinion held by the Zillah Judge respecting the talookdary right of the claimant. As it appeared, however, from the zemindaree papers which mentioned the lands to have been always held by the plaintiff and his father, that they held them as a *mouroosy-ijareh*, or hereditary farm or leasehold, which was also proved by other evidence, it was considered by the Court, that the claimant was entitled to occupy the lands at the usual rate of rent for similar tenures in the pergunnah, and that the zemindars were not justified in turning him out. Judgment was therefore given by the Provincial Court, reversing the decree passed by the Zillah Judge in favour of the alleged talookdary right, and directing, that, if the claimant should agree to pay the customary rent of the pergunnah, for the lands, as an hereditary *ijareh* tenure, a settlement should be made with him by the zemindars. The costs were made payable by the parties respectively.

Dyaram, being dissatisfied with the above decree, appealed from it to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle); but this Court concurred in the decision, and confirmed it, with costs against the appellant. In the event of the respondents refusing to make a fair settlement for the lands with the appellant, he was directed to sue them for possession and damages. (a)

(a) A *talook*, and a *mouroosy ijareh*, though both hereditary, differ in some important points. The former denomination includes tenures of various descriptions, some of which vest the talookdar with a full right of property, and entitle him, under the rules for the permanent settlement of the land revenue, to become independent of the zemindar, through whom he formerly paid his rent, and to pay his fixed assessment directly to Government. Other talooks are dependent on the zemindaree from the lands of which they are formed, but are secured, by special provisions from undue exactions of rent. The *potta*, or lease, for a *mouroosy ijareh*, does not specifically convey more than an hereditary right of occupancy. If it be not *istimrarree*, or entitling the tenant to hold at a fixed rent, the amount of the annual rent payable to the zemindar is variable, and, when not settled by mutual agreement, is determinable only by the indefinite standard of the "customary rate of the pergunnah," that is, the rent paid by similar tenures in the same pergunnah.

BIRJKISHWOR, and others, Appellants,

1806.

versus

SUMBHOOCHUND RAI, Respondent.

June 13th.

THIS was an action brought by Birjkishwor and others, in the Claim by Zillah Court of Mymensing, on the 30th of April 1794, or 20th of joint zemindars on *Phugum* of the Bengal year 1201, to recover from Kishenchund a talookdar, for of arrears of rent due on the mouzas Kali Bujael, &c. twelve in balance of number. for the Bengal years 1198, 1199 and 1200. These mouzas were held by the defendant, and were situated in an eight ana ed to be division of *perganna* Alapsing, of which the plaintiffs were zemindars. The plaintiffs claimed the amount of arrears in question, latter, on computing the annual rent, due to them from the defendant, at account of 1,552 rupees. The defendant pleaded that the *jumma*, for the years preceding specified in the plaint was no more than 315 rupees, which he years, during which stated to be the proper annual assessment for those years, in pro- they were portion to the *jumma* payable on an entire talook consisting of stated to twenty-five mouzas, of which these formed a part. The defendant at too low a further alleged, that he had paid the full amount, if not more than rate. The was due from him; and that, in strictness, the *jumma* ought not to lands of the have been been paid to the plaintiffs, as the defendant possessed an talookdar hereditary right of property in the lands, which entitled him to appraising hold them separate from the zemindaree of the plaintiffs. It ap- separable pearing to the Zillah Judge that the defendant was, as he stated, zeminda- from the ree, judg- ment given entitled to separation, a reference was made to the Collector of the district to adjust the *jumma* payable on the lands as a separated for their separation, and for the talook; and the Collector having reported the *jumma* to be 825 rupees *per annum*, the Zillah Judge considered the plaintiffs en- the balance to titled to receive rent at that rate from the defendant for the years according to in question; and, a calculation having been made accordingly, and credit given for the sums received, 1,881 rupees were awarded to the plaintiff, as balance of arrears up to the end of 1201. An order was at the same time pas- sed, that the lands of the defendant which should be costs were made payable by the parties respectively. The then as- ses- sed on them.

On appeal by the zemindars to the Provincial Court of Dacca, that Court did not consider the adjustment of *jumma*, reported by the Collector, to be conclusive, as it did not appear to the Court on what grounds that adjustment had been made, and it did not agree with any document produced in the case. From papers before the Court, relating to the entire talook consisting of twenty-five mouzas, it appeared that the proportion of annual rent payable on the twelve mouzas in question, for the three years specified in the claim, was 476 rupees; at which rate, the zemindars were entitled, for the three years, to only 1,428 rupees. The talookdar, it appeared, had paid 1,580 rupees; so that there was an excess in his payments of 152 rupees. The Provincial Court observed, that the Zillah Judge had incorrectly included in his decree the *jumma* of 1201, which year was not specified in the plaint; and that the separation of the talook, which had not been specifically sued for, could not be included in the present judgment. The talookdar was informed

1806. that he might sue in another action for the separation of his talook, and for the refund of the sum overpaid by him. The costs in the Provincial Court were made payable by the parties respectively.

Birjiahwor and others, v. Sum-bhoochund Rai. The zemindars preferred a further appeal to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle). As it clearly appeared to this Court, on investigating the case, that the respondent possessed a right of property in the lands, which entitled him to have them separated from the zemindaree of the appellants; and as from the respondent having brought that point under the notice of the Zillah Judge, though it did not actually form a part of the original claim, the Court did not consider it irregular to order the separation in the present suit; an order was given by the Court that it should be now carried into effect. And as the talook had of course been separable from the beginning, it was directed, that the arrears of past years should be settled according to the amount of revenue which might be assessed on the talook at the intended separation, in the manner prescribed by the regulations. In the mean time, as it did not appear to the Court that any certain conclusion could be drawn from the documents before it, respecting the amount of the proper *jumma*; and as the calculation formed in the Collector's office probably came nearest to an equitable apportionment; it was provided, that, until the final assessment should take place, a provisional adjustment of past accounts between the parties, should be made at the rate of *jumma* reported by the Collector to the Zillah Judge. In conformity with this arrangement, the decrees of the Courts below were amended, and final judgment passed. The costs in the Sudder Dewanny Adawlut were made payable by the parties respectively. (a)

(a) As the talookdar was entitled, according to the judgment of all the Courts, to separation of his lands as an independant talook, the zemindar could have a right only to such revenue from the talookdar as he might be considered to have paid to Government on his account, antecedently to the separation; in other words, the zemindar should be placed in the same situation in which he would have stood, had the separation already taken effect. The Court, on this principle, provided for the final adjustment of the accounts of revenue between the parties, at the same rate at which the future revenue to be paid by the talookdar to Government might be fixed.

RANEE JUGDESREE, Appellant,
ver-us
 POORUNCHUND SRIMAL, Respondent.

1805.
 June 17th.

THIS was an action brought by Poorunchund Srimal, in the Claim to an estate, Zillah Court of Rungpore, on the 20th of February 1801, to recover from the late Girdhur Lal Rai, an estate consisting of under a written en- "eight anas pergunna Beriperree," and suudry mouzas or villages. gagement The annual produce was 5,050 rupees, and the assessment ex- for the tremely low. It appeared that this estate had been purchased in the name of the defendant, from the former proprietors (relations sale of it, of Ranee Jugdesree), for the sum of 1,101 rupees, which money of repay- on failure ment was advanced by the plaintiff, and an engagement in writing, in the ment of a form of a conditional sale, was executed by the defendant on the loan of money by a Bengal date corresponding with the 24th of September 1799, to the certain following effect:—"I engage to repay you the sum of 1,101 rupees, day. Con- with interest, on or before the 2nd of December next. In default strued, of payment, the lands shall be made over to you in lieu of the from cir- amount." Fourteen months had now elapsed since the period of cumstances, that the this engagement expired. The plaintiff stated that the money had actual sale not been repaid; and claimed possession of the estate in conformity of the estate with the conditions of the engagement. The defendant refused to was not surrender the estate, pleading, 1st, that the engagement was intended, merely given as a security for the repayment of the amount, and but only that it was never intended that the estate should be actually for the transferred: 2nd, that 601 rupees had been repaid. It appeared Judgment to the Zillah Judge, that the letter of the engagement must be for the considered binding on the defendant; and as the defendant admit- estate being ted that the whole amount had not been repaid, and consequently retained on repay- that the terms of the engagement had not been fulfilled, it was ment of the pronounced, that the estate was forfeited to the plaintiff; and it principal was accordingly adjudged to him in the Zillah Court, with costs and interest against the defendant. of the loan, by an ap- pointed time.

On appeal by the defendant (Girdhur Lal) from the above decision, to the Provincial Court of Moorshedabad, that Court concurred in it, and affirmed it, with costs against the appellant. The Provincial Court did not take evidence respecting the alleged payment of 601 rupees, observing, that even were it proved, judgment must be given against the appellant. The appellant, however, was left at liberty to sue in a separate action, if he thought fit, for the refund of the amount.

In this interval Girdhur Lal died; and a further appeal was preferred to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington), by Ranee Jugdesree, who appeared to have been the real purchaser of the estate, and party to the engagement, under the name of the deceased. The Sudder Dewanny Adawlut, on considering the circumstances of the case, did not concur in the above decisions. Of two receipts produced by the late appellant in support of the alleged payment, one appeared to be dated after the expiration of the period of the engagement; and as the acceptance of partial payment by the respondent after the period specified for the conditional sale, would, if proved, have been

1806. *Ranee Jugdesree, v. Poorun-chund Srimal.* sufficient ground for concluding that a sale was not intended, witnesses on the part of the appellant were examined by order of the Court, as to the fact of the payment of the money. The evidence obtained, however, was not conclusive; though, on the whole, there appeared a presumption in favour of some payment having been made. It was clear, that, after the expiration of the period specified in the engagement for the conditional sale taking effect, the appellant remained in possession of the estate upwards of a year, before any claim to it was made by the respondent; and this circumstance was considered by the Court to be a strong ground for presuming, either that something must have occurred to void the penalty of the engagement, or that (as alleged by the appellant) it had not been in the contemplation of the parties that the estate should be actually transferred. The amount of the engagement, though it was the price for which the estate was sold by the former proprietors to Ranee Jugdesree, a near relation, appeared to be a very inadequate price for an estate of the value of that in dispute, if sold to a stranger, like the respondent; and this also favoured the inference that the actual transfer of the estate had not been intended. Under the circumstances of the case, the Court did not consider it proper to confirm the transfer of the estate to the respondent for the inadequate price specified in the engagement; and judged it equitable, that the appellant should be relieved from the letter of the engagement, and be allowed to retain her estate, on condition of paying to the respondent, within four months, the full amount of the principal and interest of the debt for which the engagement was executed. The decrees of the Zillah and Provincial Courts were accordingly reversed, and final judgment given, as above, by the Sudder Dewanny Adawlut. The costs in each of the Courts were made payable by the parties respectively. (a)

(a) The Courts were satisfied, that the original intention of the parties was not the sale of the estate, but the security of the loan. The real purchaser, Ranee Jugdesree, who was allied to the former proprietors, had bought the estate for a low price, and the purchase money was borrowed from the respondent, on the security of the engagement which formed the subject of the suit. But it was evidently not in contemplation to transfer the estate, at the same inadequate price, to the respondent, who was a stranger to the family of the former proprietors. In addition to this consideration, the inadequacy of price weighed with the Court in relieving the appellant from the transfer of the estate under the letter of the engagement.

BUNCHANUND, Appellant,

1806.

versus

HURGOPAL BHADERY and NUNDGOPAL BHADERY,
Respondents.

July 21st.

THIS was an action brought by Bunchanund in the Zillah Court Claim by a of Mymensing, on the 6th of December 1800, or 23d of *Aghun* of zemindar the Bengal year 1207, to recover from Hurgopal and Nundgopal on two talookdars, the sum of 4,515 rupees, as arrears of rent due on the villages for ba-Mudarjane, &c. from the beginning of *Srawun* of the Bengal year 1206, to the end of *Kartick* 1207. It was set forth in the plaint, that arrears of rent for a certain period, during which the latter were alleged to have paid justing the rent of dependent landholders, the sum of 4,581 rupees at too low a rate. The rent of the talookdars was the annual *jumma* demandable from the defendants, and the rate at which he claimed the arrears in question for the period specified; but that the defendants had refused to pay rent for this appearing variable; sued them for the arrears stated in the claim. The defendants, and there not being any settled rates of similar tenures in the pergunnah, according to which it could be determined; judge a title to so high a *jumma*, as that under which he laid claim ment for to the arrears specified in the plaint. And, on the other hand, it being fixed, for future years, by actual survey, and for past accounts being settled so fixed, was not considered by the Zillah Judge to be proved by the defendants, that the lands had been held by them at a fixed rent. A *rusud beishee*, or gradual increase of revenue, had been assessed on the pergunnah Pokhurya; at the formation of the decennial settlement; in proportion to which, the increase demandable on the whole of the lands of the defendants, was calculated to be 781 rupees, 8 anas, 17 pie; which, therefore, in addition to 1,981 rupees, 14 anas, 4 pie, acknowledged by the defendants, (being together 2,763 rupees, 7 anas, 1 pie) was considered to be their proper rent; and of this sum, 2,734 rupees, 7 anas, 4 pie, 3 cowries, appeared to be the proportion payable for that part of them which was situated in the plaintiff's zemindaree. On a calculation of the rent, at this rate, for the period to which the claim referred, there appeared, after deducting the payments of the defendants, an arrear due from them of 958 rupees; and this sum was accordingly adjudged to the plaintiff, in part of his claim, with proportionate costs against the defendants.

On appeal by the defendants from the above decision to the
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1806. Provincial Court of Dacca, that Court did not concur in it, being of opinion that the zemindar had not proved a title to demand from the defendants, who appeared to the Court to be talookdars, any higher *jumma*, for past years, than had been paid by them to the former zemindar. As it clearly appeared, however, that the tenure of the talookdars was not such as to authorize their holding the lands at a fixed rent, the zemindar was declared at liberty to make a settlement for future years, in proportion to the assets, under the rules laid down respecting the rent of dependent landholders, in the 51st section of regulation 8, 1793. The decree of the Zillah Court was reversed accordingly, with costs payable by the respective parties.

Buncha-
nund, v.
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dery.

On appeal by the zemindar from the above decision to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle,) this Court entertained no doubt of the lands being held by the respondent at a variable rent, or of their being of that description of tenures on which the zemindar is entitled to demand an increase of rent in proportion to the ascertained assets; and as there did not appear to be in the pergunnah any settled rates of rent for similar tenures according to which the proper rent could be adjusted, it was determined, that the rent demandable from the respondents should be settled by an actual survey and measurement, to be made at the expence of the appellant, unless the parties should come to an adjustment between themselves. In the event of no adjustment being made by them, it was directed, that the Zillah Judge should cause a measurement of the lands, and estimate of their produce, to be taken, and, after deducting from the produce ten *per cent*, as the customary profit of the talookdars, together with the actual charges of collection, should fix the residue as the annual rent demandable by the appellant for future years, as well as the rate at which the arrears of the period specified in the claim of the appellant, should be adjusted. The decree of the Provincial Court was accordingly amended, and final judgment given by the Sudder Dewanny Adawlut, in conformity with the above arrangement; with costs, in each of the Courts, payable by the respective parties. (a)

(a) There being no rule expressly applicable to the adjustment of rent in this case, the decision was passed upon an equitable consideration of the right of the zemindar to receive a variable rent proportionate to the produce of the lands which formed a constituent part of his zemindaree, and of the right of the talookdars, as holders of an hereditary though subordinate tenure, to participate in the rent produce of the lands composing it.

SHUNKUR DUTT OJHA and ROODER DUTT OJHA,

1806.

Appellants,

July

versus

MUSSUMMAUT SONAEN OJHAEN, Respondent.

THIS was an action brought by Sonaen Ojhaen, in the Zillah Court of Ramghur, on the 7th of May 1801, to recover from Shunkur Dutt and Rooder Dutt, the *lakhiraj* mouzas Kishenpoor, &c. eighteen in number, situated in pergunnah Malayoon. The annual produce of them was estimated at 500 rupees. It was set forth in the plaint, that the lands in question had been the property of Lullutpan, the deceased husband of the plaintiff, having been acquired partly by his father and partly by himself, under grants from Raja Jykishen, former zemindar of the pergunnah, conferring them, exempt from assessment, in consideration of services performed in the education of the Raja, and afterwards of his children; that the plaintiff, on the decease of her husband in the year 1767, succeeded to them, and held them undisturbed on the same tenure, till 1800, at which time the defendants advanced claims to them: that, a short time before this action was brought, Choramun Rai, the present zemindar (to whom the plaintiff had complained, on being molested in the possession of her lands, and whom she stated to have joined with the defendants against her), came to her house, with several others, and made her sign an instrument entitled *wurseut nameh*, or deed constituting heirs, in favour of the defendants, under which they had wrongfully deprived her of her lands. She sued to recover them, as not having consented to transfer them. The defendants (who were distantly related to the plaintiff), contended, first, that the lands had not been granted to the husband and father-in-law of the plaintiff, alone, a great part of them having been acquired by other members of the family; and that the plaintiff had less claim than the defendants to possess them by hereditary right; second, that the *wurseut nameh* was voluntarily executed by the plaintiff. This deed, as produced in Court, purported to have been executed by the plaintiff, in the presence of the zemindar and others; declared the defendants to be her heirs; and transferred her estate to them, with a condition that they should support her for life. Witnesses were called by the defendants, who deposed to the deed having been voluntarily signed by the plaintiff in their presence. The Zillah Judge was of opinion that the deed was binding on her; and inferring, from a provision being made in it for her support, that the lands were intended to be made over by an immediate transfer, concluded that the plaintiff's claim could not be maintained. The claim was in consequence dismissed in the Zillah Court, but with costs payable by the defendants, as being in possession of the plaintiff's estate: and it was at the same time signified to the defendants, that they were to support the plaintiff for life under the stipulation of the deed.

On appeal by the plaintiff from the above decision to the Provincial Court of Patna, that Court did not concur in it. It appeared to the Provincial Court, on further investigation of

1806. the case, that the mouzas in question, as stated by the claimant in the Zillah Court, had been acquired by her husband and father-in-law; that, after the decease of her husband, and of the widow of her husband's brother, the claimant held them in sole and undisturbed possession until the year 1800, at which period Shunkur Dutt and Rooder Dutt preferred claims to the mouzas, as being descended from an ancestor common to them and the acquirers; and that the present claimant, at the instance of the zemindar, agreed, in the presence of the zemindar and several others, to settle the disputes which had arisen in consequence, by constituting Shunkur Dutt and Rooder Dutt her heirs, to succeed to her estate at her death; and to execute a deed to that effect. With respect to the deed in question, containing a clause for vesting her property in them before her decease the Provincial Court saw sufficient ground to presume, that fraud, or other undue means, had been used in obtaining her signature to it; and there was proof, that very soon after the execution of the deed, when the claimant found that it alienated her property immediately, she protested against it as having been fraudulently imposed on her. On the ground that the deed was not what the claimant intended, or had agreed to sign, the Provincial Court held it to be void; and, under section 15, regulation 4, 1793, having put a case to their pundit, detailing the circumstances above stated, for his opinion, whether the deed was valid by the Hindoo law, received an answer that it was not. The Provincial Court, therefore, setting aside this deed, under which Shunkur Dutt and Rooder Dutt had obtained possession of the lands; and not considering those persons to possess any hereditary title to them; adjudged them to be restored to the claimant; and reversed the decree of the Zillah Judge.

Shunkur
Dutt Ojha
and Rooder
Dutt Ojha,
v. Musumant
Soman Oj-
haen.

On appeal by Shunkur Dutt and Roeder Dutt from the above decision to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), this Court concurred in opinion with the Provincial Court, and dismissed the appeal, with costs against the appellants; adding, that they were to account to the respondent for the profits of the lands during the period of their illegal possession.

SHAKIR JAN and AULUM JAN, Appellants,

1806.

versus

AHMUD OLLAH, Respondent.

Aug. 1st.

THIS was an action brought by Ahmud Ollah, on the 6th of September 1803, in the City Court of Moorshedabad, against Shakir Jan, Aulum Jan, and another, named Peer Buksh, to recover the sum of 6,628 rupees, as balance of the value of goods sold on account of the plaintiff to Peer Buksh, by Shakir Jan and Aulum Jan. It was stated by the plaintiff, that, at the end of the year 1802, he came from Lucknow to Moorshedabad, with shawls and other goods for sale, and, in consequence of letters of recommendation, applied to the defendants Shakir Jan and Aulum Jan, who were agents and brokers in that city, to dispose of his goods: that they agreed to sell the goods, under responsibility for the payment of the purchase money, at a commission of three rupees two anas *per cent*; and accordingly sold to the defendant Peer Buksh 120 shawls, for 7,051 rupees, payable in four months, which had now expired; that, after deducting commission, and the value of Malda cloths and other articles, received in part payment, there remained due to the plaintiff, the sum specified in the claim. The defendants Shakir Jan and Aulum Jan denied that they sold the goods under the responsibility stated, and alleged, that the only person answerable for the amount was the defendant Peer Buksh. This was admitted by Peer Buksh, who also acknowledged having bought the shawls at the price stated by the plaintiff, as well as having executed an engagement for paying the amount in four months; but he stated that he had since failed in trade, and was insolvent. From the evidence of witnesses on the part of the defendants, who deposed, that the goods were sold by Shakir Jan and Aulum Jan merely as *dul ls.* or brokers, the City Judge, considering that they were not responsible, but that the purchaser alone was answerable to the plaintiff for the price of the goods, gave judgment for the plaintiff against the purchaser only, with costs.

On appeal by the plaintiff from the above decision to the Provincial Court of Moorshedabad, it appeared to that Court, on further investigation of the case, that there was great reason to suppose collusion between the agents and the purchaser, to defraud the claimant, who appeared to have been a stranger at Moorshedabad, and unacquainted with the customs of traders in that city. The entries relating to the transaction, in the books of Shakir Jan and Aulum Jan, as produced before the Provincial Court, had evidently been altered; and those in the books of the claimant mentioned expressly that the sale was on the responsibility of the above persons. This was corroborated by several witnesses for the claimant, who appeared likely to have known the terms of the transaction; and one of them further deposed, that he had since heard Shakir Jan acknowledge the responsibility. The Provincial Court being of opinion that Shakir Jan and his partner had acted as agents, responsible for the value of the goods, and that the claimant might have recourse against them, as well as against the

1806. purchaser, the decree of the Zillah Judge was amended, and judgment given for the amount to be paid to the claimant, with costs, by Shakir Jan and Aulum Jan.

Shakir Jan and Aulum Jan, v. Ahmad Ollah.

On appeal by these persons from the above decision to the Sudder Dewanny Adawlut (present H. Colebourne and J. Fombelle), they still alleged that they were not responsible; and rested their plea on the ground that the goods were sold by them, not as *arut-hiyas*, or agents, but merely as *dulals* or brokers; and that, therefore, no responsibility attached to them. From the evidence of several native agents, examined as to the custom of traders, it appeared, that the *dulal* seldom transacts business under responsibility for the price of the goods sold by him, and that the *arut-hiya* frequently does, though not without some agreement to that effect; express or implied. The commission of 3 rupees 2 anas *per cent*, charged in the present instance, was found to be unusually high, as commission on agency; and from this circumstance, in addition to the evidence on the part of the respondent, adverted to by the Provincial Court, it was held by the Sudder Dewanny Adawlut, that the appellants had undertaken the alleged responsibility in the sale of the respondent's goods on credit, and were bound to make good the value to him. The decree passed by the Provincial Court against the appellants, was therefore confirmed, and the appeal dismissed, with costs, and interest on the sum adjudged to the respondent, from the date on which the suit commenced.

1806.

Aug. 8th.

RUZIA BEGUM, (Widow of HAJI MOOHUMMUD ALI),
Appellant,

versus

AKA MOOHUMMUD IBRAHIM, Respondent.

Claim by the heirs of a person deceased, on the widow of his executor, for their portion of the estate which came into the executor's hands. Judgment in their favour for two-thirds of it. Legacies, by the Moohummudan law, limited to a third of a

ABOUT the year 1775, Aka Moohummud Ruza, a native of Ispahan in Persia, came to settle at Moorshedabad, and after residing in that city many years, and acquiring property by trade, died there in 1799. By a will which he made, appointing the late Haji Moohummud Ali and another, executors, it was directed, that after payment of debts and incidental charges, together with certain legacies, the bulk of the property should go to his heirs, Fatima daughter of Khudija, and her son Ali, if alive. Haji Moohummud Ali acted as executor under this will. Aka Moohummud Ibrahim alleged, that he called on Haji Moohummud Ali, before his decease, as agent on the part of the testator's heirs resident at Ispahan, to render an account of the property; but that the executor constantly evaded the demand or the production of accounts, though he acknowledged the authority of the agent. The present action was accordingly brought by Aka Moohummud Ibrahim in the City Court of Moorshedabad, on the 7th of April 1804, under a power of attorney dated at Ispahan, from Fatima Khanum and Khudija Khanum, as nieces and surviving heirs of the testator, empowering him to recover on their behalf, from the executor, the amount to which they were entitled of the estate.

The claim was laid at 25,000 rupees. The defendant, who, it 1806. appeared, was in possession of her late husband's property under a deed of gift, transferring to her every thing in his possession, in lieu of *mehr* or dower, settled on her at her marriage, pleaded, 1st, that there were no surviving heirs of the testator, and that the plaintiff had no real authority to sue her; 2nd, that her husband, as executor to the estate, performed his trust; 3rd, that the property in her possession was exclusively her own, and not liable for any claims on her husband. From the circumstance of Fatima being mentioned in the will as the daughter of Khudija, whereas, in the power of attorney produced by the plaintiff, they were mentioned as sisters, and both nieces of Aka Kuza; the City Judge did not believe the power of attorney to be genuine, or that there were any such persons as the alleged nieces; and as, from accounts of the estate, produced by the defendant, the executor appeared to have disbursed the whole assets; it was concluded that the action could not be maintained; and a decree was passed accordingly in the City Court, dismissing it with costs.

On appeal by the plaintiff from the above decision to the Provincial Court of Moorshedabad, that Court did not concur in it. It was proved to the satisfaction of the Provincial Court, that Fatima and Khudija Khanum, resident at Ispahan, were the nieces and surviving heirs at law of the testator, though a mistake as to their respective relationship occurred in the will; and the power of attorney was established, by information received respecting it, and from evidence taken as to the mode of authenticating documents of this nature in Persia, with which it perfectly accorded. There was proof, moreover, that the late executor had acknowledged the appellant, as agent for the heirs, and advanced to him a small sum in that capacity. There appeared to the Court great reason to suppose, that the deed of gift executed by the late executor in favour of his wife, transferring to her all the property in his possession, in payment of dower, was made principally with a view to defeat the claims of the testator's heirs; and the Court held, in concurrence with an opinion given by their Moohummudan law officers, that, as the executor could have had no power to give away what was not his own, the heirs could maintain an action against his widow, notwithstanding the gift, for any property, not duly accounted for, which should appear to have formed a part of the estate to which he administered. According to the accounts of the estate, as produced before the Court, the gross assets appeared to have been only 12,161 rupees; and the whole of that sum was set down as disbursed by the executor, in legacies, charitable donations, and under other heads. But the Court saw reason to believe, that the executor, abusing his trust, had appropriated to himself the greater part of the assets of the estate, notwithstanding the alleged disbursements; and at all events, as it is a known maxim of Moohummudan law, that a man cannot bequeath at will more than a third of his estate; and as the executor was not authorized to disburse, under any head, more than a third of the net assets of the estate to which he administered; it was determined, that credit for the alleged disbursements could only be allowed in that proportion, exclusive of the debts

1806. and necessary charges; and that the heirs had a right to recover the remainder. An adjustment was accordingly framed by the Provincial Court, by deducting, in the first place, from the gross assets of the estate, the amount of wages due to servants of the testator, and the value of property sold by the executor, but of which the value had not been realized; and the balance being assumed as the net assets of the estate, one-third was deducted for the legacies and other disbursements of the executor, and the remaining two-thirds, amounting to 5,819 rupees, were declared the portion of the respondent's constituents. Of this, 590 rupees were found to have been received by the respondent, from the late executor, on account of the heirs; and the balance remaining due was therefore 5,229 rupees. The judgment passed by the City Court being reversed, this sum was adjudged to the respondent on behalf of his constituents, to be recovered from the widow of the executor, out of the property transferred to her by her husband before his decease; together with the costs in the Provincial and City Courts.

Ruzia Begum, v. Aka Moohummud Ibrahim.

On appeal from the above decision, by the widow of the executor, to the Sudder Dewanny Adawlut (present H. Colebrouke and J. Fombelle) this Court concurred in the principle of the decision, but considered it necessary to make some alteration with respect to the items to be deducted from the gross amount of the estate. The Court observed, that the executor, in selling houses and other property belonging to the estate, ought to have exacted immediate payment, instead of selling upon credit to irresponsible buyers; and that, under the circumstances of the case, no deduction could be allowed for value stated not to have been realized, the recovery of it being considered to rest with the representative of the executor, and not with the heirs of the testator. On the other hand, it appeared to the Court that the funeral expenses and some other charges, in addition to those noticed by the Provincial Court, might properly be deducted from the gross assets. But the adjustment finally determined on, the balance due to the respondent's constituents amounted to 6,044 rupees. The decree of the Provincial Court was accordingly amended by the Sudder Dewanny Adawlut, and final judgment given in favour of the heirs, for the above sum, with costs against the appellant. (a)

(a) In one of the questions of Moohummudan law, involved in this case, viz. whether the husband's gift of his whole estate to his wife, in satisfaction of her dower, was a bar to an action against his estate, for property which came into his hands as executor, it appeared from the opinions of the law officers, that a creditor could not have recovered against the wife from the assets which came into her hands by gift from her husband, but that, as he could have no power to give what was not his own, the donation of any property, not actually his, could be no bar to the suit. The Court, under this opinion, considered the amount of the property in the hands of the executor to be unalienable by him, and proper to be separated and deducted from the donation of his estate, made by him in favour of his wife. The other point of Moohummudan law, which came under consideration in the decision of the cause, was the limitation of legacies to one-third of the testator's property, exclusive of funeral charges and debts.

DHUNSING GIR (Pauper), Appellant,
versus
MYA GIR, Respondent.

1806.

Aug. 15th.

THE parties in this case were Hindoos, of the religious order termed *Sunyasis*. The action was brought by Dhunsing Gir in the City Court of Benares, on the 6th of December 1802, to recover from Mya Gir, a moiety of property consisting of houses, gardens, &c. to the value of 25,000 rupees, stated to have belonged to Toola Gir, the late *mohunt*, or principal of a religious institution, to which the parties were attached. The claim was preferred by the plaintiff on the ground that he and the defendant were appointed by the late *mohunt* to succeed jointly to his property, but that the defendant wrongfully kept possession of the whole. The defendant denied that the late *mohunt* had made any such provision; and stated the plaintiff's claim to be unfounded, and himself to be the sole successor. The following engagement, purporting to have been executed by the late *mohunt* in favour of the plaintiff, was produced in support of the claim; "I, Toola Gir, have prevailed on Dhunsing (the plaintiff) to give me three of his sons, to be adopted as my grandsons; on which condition I will make him my *chela*, and leave him half my property." This document was denied by the defendant to be genuine, or to be at all consistent with the usage of the sect; and as it was not considered to be established by the testimony of persons called as witnesses by the plaintiff, it was disallowed. According to the custom of religious societies of the nature of that to which the parties belonged, it appeared, that, out of the *chelas* or pupils, whom the *mohunt*, in his capacity of *gooroo*, or spiritual teacher, instructs in the doctrines of the sect, some one is selected by him to succeed at his decease; and that, after his death, the *mohunts* of other similar institutions in the vicinage convene an assembly of the order, for performing the *bundhara*, or funeral obsequies, at which they generally confirm the nomination made by the deceased, and instal the pupil he selected, as his authorized successor. In the case in question, it was proved by witnesses for the defendant, that the late *mohunt* appointed the defendant his principal pupil, and portioned off other pupils, that they might not interfere with him; that he was installed as the successor at the celebration of the obsequies; and that the plaintiff was present at the time, and did not then set up any pretensions. It being in consequence the opinion of the City Judge, that the defendant was sole successor of Toola Gir, the plaintiff's claim was dismissed in the City Court.

On appeal by the plaintiff from the above decision to the Provincial Court of Benares, and finally to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), those Courts, concurring in the judgment passed against the claim, respectively dismissed the appeal. (a)

(a) According to the established usage of the religious order of *Goonias* or *Sunyasis*, the installation of the respondent as *mohunt*, by the assembly of neighbouring *mohunts* at the obsequies of the deceased, was conclusive. The several

1806.

JOOGUL KISHWOR, and others, Appellants,

versus

Aug. 18th.

RADHAKAUNT GHOSE, Respondent.

Claim by the respondent to interest, during two appeals, on the amount of a zillah decree passed in his favour, and confirmed on each of the appeals. Claim adjudged.

RADHAKAUNT, who in this case was plaintiff in the Zillah Court of Nuddea, had, in a former suit in that Court, in April 1794, obtained a judgment against the defendants for the sum of 13,790 rupees, the amount (principal and interest) of rents collected by the defendants from lands of which they had wrongfully dispossessed the plaintiff. The defendants, after giving security for staying the execution of the decree, appealed to the Provincial Court of the division, and from thence to the Sudder Dewanny Adawlut, where the judgment was finally confirmed on the 23d of August 1802. This action was brought on the 11th of December 1802, to recover interest on the amount of the judgment alluded to, from the date of its being given in the Zillah Court of Nuddea, to that of its being finally confirmed by the Sudder Dewanny Adawlut. The defendants pleaded, that they had been ready to pay the amount adjudged, at the date of the zillah decree; and that, as it included the interest then adjudged due to the plaintiff, they were not responsible for any further interest. From a copy of the decree of the Sudder Dewanny Adawlut, as produced in Court, it did not appear that there was any express order for interest being paid, or not, on the amount of the zillah decree, which the Court confirmed; but as it is directed in section 3, regulation 13, 1796, that, on the decree of a Zillah or City Court being confirmed on appeal to a Provincial Court, or finally to the Sudder Dewanny Adawlut, interest shall be paid on the sum recoverable under such decree, to the date of its ultimate confirmation; judgment was given in favour of the plaintiff in the Zillah Court of Nuddea for 10,769 rupees, being the sum of simple interest on the amount of the decree, at the rate of 12 *per cent*, during the period that the appeals from it were depending.

On appeal by the defendants to the Provincial Court of Patna, and from thence to the Sudder Dewanny Adawlut (present J. H. Harrington and J. Fombelle), those Courts concurred in the decision of the Zillah Judge, and confirmed it, with further interest on the sum adjudged, to the dates of their respective decrees. It was observed by the Court of Sudder Dewanny Adawlut, with reference to the rule noticed in the zillah decree, that, as the sum adjudged to the plaintiff in the Zillah Court, in April 1794, remained for several years afterwards in the hands of the defendants, in consequence of the two appeals preferred by the latter; and as it must be presumed, that they made use of the money during that interval; there did not appear any reasonable ground for their plea against the payment of interest. (a)

courts gave no credit to the special agreement alleged by the appellant; and maintained, by the decree in the cause, the regular election of the defendant in conformity to the usage of the order.

(a) This decision may be considered a precedent for admitting a new suit, to supply an evident defect in a former decree, with respect to interest on the amount adjudged. It does not clearly appear why interest on the sum adjudged by the zillah decree of April 1794, was not included in the confirmatory judgment passed by the Sudder Dewanny Adawlut in August 1802. But it is

DOORGAPERSHAD BOSE, Appellant,

1806.

versus

THE COLLECTOR OF THE TWENTY-FOUR PERGUNNAHS,
Respondent.

Aug. 18th.

IN this case, the allegation of Doorgapershad Bose, who commenced the action in the Zillah Court of Hoogly, on the 28th of June 1802, or 16th of *Asarh* of the Bengal year 1209, was that, on the "Mouza Burumpore" being exposed for public sale, in 1203, on account of arrears of revenue due from the former proprietor, the plaintiff bought it, trusting to the *latbundi* papers, or detail of the lands and produce, exhibited at the sale, which stated the extent at 624 beegas, the annual produce at 1,091 rupees, and the *jumma* or assessment at 948 rupees; but that, when the plaintiff entered on the purchase, and procured a measurement and survey to be made, there proved to be a deficiency of 113 beegas, equal to 354 rupees of annual rent. The action therefore was brought against the Collector of the district on the part of Government, for an abatement in the *jumma* assessed on the purchased mouza, and to recover 1,418 rupees, as excess of revenue, paid by the plaintiff, during 1204 and the three succeeding years. The defendant denied that the plaintiff's claim to an abatement could be maintained; and cited the rule laid down in section 29, regulation 7, 1799, in which it is declared, that Government is not responsible for the correctness of statements of the rent and produce of lands, exhibited at the public sales; but that, in the event of a purchaser being able to show that the accounts, on which the assessment has been adjusted upon a portion of an estate, purchased by him at a public sale, are false, or grossly erroneous, the Governor General in Council has reserved to himself the power of ordering a new allotment of revenue on the portion so purchased, on an application to that effect being made, through the Board of Revenue, within a year from the date of the purchase, or in the case of purchases prior to the above regulation, within a year after the date of its being promulgated. The defendant admitted that the plaintiff had made an application to the Board of Revenue within the prescribed period, but stated that it had been rejected, as having no just foundation. Regulation 7, 1799, not having been in force when the purchase in question was made, the Zillah Judge did not consider its provisions applicable. According to a report, exhibited by the plaintiff, of a measurement and survey made by an *aumeen* deputed on the part of the late Collector, it appeared to the Zillah Judge that the *jumma* assessed on the lands purchased by the plaintiff was incorrect; and as it is declared in the 10th section of regulation 1, 1793, (containing rules for assessing the *jumma* on parts of estates sold at auction,) that the *jumma* assessed on any part of an estate, so sold, is to bear the same proportion to the produce of that part, as the revenue assessed on the whole bears to its produce, the plaintiff was considered by

presumable that the Court, in not applying the rule contained in section 3, regulation 13, 1796, supposed the decree of the Zillah Judge to have been carried into execution.

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Doorgaper-
shad Bose,
v. the Col-
lector of
the twenty-
four Per-
gunnabs.

the Zillah Judge to be entitled to a new assessment, in proportion to the revenue of the whole estate to which the lands purchased by him had belonged, and to recover the excess paid during the years stated in the plaint. Judgment was given accordingly in his favour, in the Zillah Court, with costs against the defendant.

On appeal by the Collector from the above decision to the Provincial Court of Calcutta, that Court did not concur with the Zillah Judge, but held, that, although the adjustment of revenue on the purchased lands, required by section 10, regulation 1, 1793, should not have been correctly made in the present instance, at the time of the public sale, that regulation could not authorize an alteration of the assessment to be adjudged, the power of altering the public assessment not having been vested in the civil courts by any regulation, and having been reserved exclusively to the Governor General in Council, by the 29th section of regulation 7, 1799, under the circumstances there specified. It was therefore the opinion of the Provincial Court, that the purchaser could not support his claim to an abatement of the *jumma* assessed at the time of purchase; and consequently, that no surplus payment was recoverable. The decree passed by the Zillah Judge in favour of the purchaser, was therefore reversed by the Provincial Court, with costs at the purchaser's charge.

An appeal was made by the purchaser from the decision of the Provincial Court to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), who confirmed the judgment given by the Provincial Court, on the following considerations; 1st, on a reference made by this Court to the Board of Revenue, it was found, that the measurement and survey, exhibited by the appellant before the Zillah Judge, had been made by an *ameen* not deputed by regular authority from the Board of Revenue; that they were not admitted by the Board to be correct; and that there was reason to attribute the incorrectness to collusion between the *ameen* and the appellant. They were, therefore, not considered by the Sudder Dewanny Adawlut to afford any evidence of the real assets, or extent of the lands. 2nd, it was also ascertained from the Board of Revenue, that the appellant, during three years after this purchase of mouza Burumpore, made his annual payment of the public assessment without preferring any complaint of its being disproportioned to the produce of the mouza. It appeared also, that the appellant had afterwards petitioned the Governor General in Council for an abatement, under the 29th section of regulation 7, 1799, but that his petition, on a consideration of the grounds of it by the Board of Revenue, had been rejected. 3d, the Sudder Dewanny Adawlut concurred with the Provincial Court in opinion, that, under the former, as well as the subsisting regulations, the courts of justice were not competent to adjudge an abatement of the public assessment, fixed upon portions of estates disposed of at the public sales; and the Court observed, that the Governor General in Council, who had reserved to himself the power of ordering a new assessment in such cases, under the rules contained in the regulation above cited, and on the conditions there specified, had not considered those conditions to have been fulfilled in the present case, but had been of opinion (as declared on

the occasion of the purchaser's petition being rejected,) that the purchaser had not shown himself entitled to any abatement of the assessment fixed upon the lands purchased by him. 4th, the purchaser, whose demand was for an abatement of *jumma*, had not claimed, or applied in the course of his suit, to have the purchase made by him set aside, on the plea of error in the papers exhibited at the time of sale; nor did it appear that, if he had made such claim, there would have been any ground to support it. The decree passed by the Provincial Court against his claim to an abatement of assessment, was accordingly confirmed by the Sudder Dewanny Adawlut, and the appeal dismissed with costs. (a)

LUKHIKAUNT RAI, (Agent for RANEE JYDURGA), Appellant, 1800.

versus

BIRJNATH RAI, Respondent.

Aug. 25th.

THIS was an action brought by Birjnath Rai, in the Zillah Court of Rungpore, on the 24th of December 1800, to recover from Lukhikaunt Rai, lands comprising the pergunnah Muklipoor, with the exception of twenty-eight mouzas. The *jumma* assessed on the lands claimed was stated to be 8,447 rupees. It was alleged by the plaintiff, that the defendant bought at public auction the whole pergunnah, for 13,325 rupees, but, not being able to raise money to pay for it, sold twenty-eight mouzas to other persons for 3,790 rupees, and the remainder to the plaintiff for 9,535 rupees, and gave him possession on payment of the money; that the plaintiff afterwards made the defendant his agent for the management; a circumstance of which the defendant took advantage, and set himself up as proprietor. The defendant denied that the plaintiff purchased the lands from him, and stated that they never belonged to himself, but that he purchased the pergunnah at the public sale, on account of Ranee Jydurga, to whom he was agent; that Ranee Jydurga, finding herself unable to make good the whole purchase money, parted with the twenty-eight mouzas not included in the present suit, but retained those claimed by the plaintiff for herself, and registered them, from motives of private convenience, in his (the defendant's) name. An *ikrarnama*, or written acknowledgment, bearing the name of the defendant, admitting the lands to have been purchased from him by the plaintiff.

(a) The principle declared in the judgment upon this case, that the Governor General in Council, only, is competent to grant an abatement of the public assessment upon portions of estates, disposed of at the public sales, corresponds with the express provisions of section 29, regulation 7, 1799, extended to the province of Benares by the 26th section of regulation 5, 1800, and re-enacted for the Ceded and Conquered Provinces by the 6th section of regulation 26, 1803. It is not applicable, however, to suits for annulling a public sale, and recovering the purchase money, on the ground of any evident and material error in the description of the lands, advertised to be sold, and specified in the bill of sale delivered to the purchaser. In such case, if redress be not granted on application to the Board of Revenue, and Governor General in Council, the purchaser is at liberty to sue, in the mode prescribed for public suits, to have the sale annulled by judicial process, and the purchase money restored to him.

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kaunt Rai,
v. Birjuath
Rai.** tiff, and purporting to be executed as a written conveyance for the transfer of them, was produced by the plaintiff in the Zillah Court. It was positively denied by the defendant; but it was supported by the evidence of several witnesses brought by the plaintiff; and the Zillah Judge believing their testimony, considered the document to prove that the lands in question were bought from the defendant by the plaintiff. Judgment was accordingly given in the plaintiff's favour in the Zillah Court, with costs against the defendant.

On appeal by the defendant from the above decision to the Provincial Court of Moorshedabad, that Court concurred in it, and dismissed the appeal with costs.

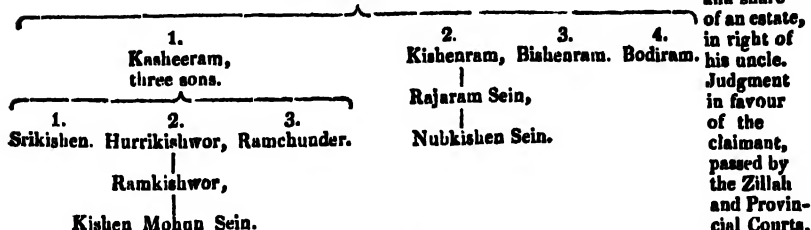
On further appeal to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington), this Court reversed the above decisions for the reasons which follow; evidence having been taken, by order of the Court, with respect to the payment of the purchase money for the lands in question by the respondent to the appellant, the fact was not proved; and, from the inconsistency of circumstances, affirmed by the respondent, with the particulars stated by the witnesses called by him, it was not believed that any such payment had been made. No reason appeared, why, if he really had purchased the lands, he should not have registered them in his own name, as proprietor, instead of permitting them to remain, as they had all along been, in the name of the appellant. From the testimony of several persons named by Ranee Jyidurga, and examined by order of the Court, it was proved, that 9,535 rupees, the proportion of purchase money for the lands in question at the public sale, was raised, by Ranee Jyidurga, partly from her own funds, and partly by borrowing on the security of her jewels, and was paid into the Collector's office by the appellant on her account, as purchaser of the lands, immediately after the public sale. Under these circumstances of presumption in favour of the right of Ranee Jyidurga, and against the alleged purchase of the respondent, the proof of which rested solely on the credit of the witnesses to the written acknowledgment exhibited by him, the Court were of opinion that there was strong reason to suspect fraud on the part of the claimant; and as there was not, in any view, sufficient ground for a judgment in favour of the claim, against the party in possession, the decrees passed by the Zillah and Provincial Courts, were reversed by the Sudder Dewanny Adawlut; with costs, in each Court, against the respondent.

NUBKISHEN SEIN, Appellant,
versus
 KISHEN MOHUN SEIN, Respondent.

1806.
 Sept. 1st.

THIS was a case respecting part of a talook in pergunna Selimabad. The talook had belonged to the ancestor of a family, of which the parties were descendants in different branches ;—

RAMKISHEN SEIN,
 four sons.



The action was brought by Ramkishwor, the father of Kishen Mohun Sein, in the Zillah Court of Backergunge, on the 8th of July 1793, or 27th of *Asarh* of the Bengal year 1200, to recover from Nubkishen, by right of succession to Ramchunder, the plaintiff's uncle, a five ana share of the talook, stated to have belonged to him, and to be illegally in possession of the defendant. The defendant denied that the plaintiff had any claim, through his uncle Ramchunder, to the lands forming the share in question, stating, that Ramchunder, in the Bengal year 1183, got possession of them by undue means, without any title; that after his death, possession was restored to the defendant's father, as legal proprietor; and that the defendant succeeded at the decease of his father, and had since held possession. On the part of the plaintiff some *butwara* papers, or records of a partition, dated in 1183, were produced in evidence, which specified the five ana share in question as allotted to Ramchunder, the plaintiff's uncle, at a partition of the talook among the family of Ramkishen Sein. As these papers bore, among other signatures, that of the defendant's father; and as the Zillah Judge considered them to be authentic, and to prove that the five ana share, which formed the subject of the suit, was the legal property of the plaintiff's uncle; it was concluded that the plaintiff as heir of his uncle, was entitled to recover them; and judgment was accordingly given in the plaintiff's favour, in the Zillah Court, with costs against the defendant.

On appeal by the defendant (Nubkishen Sein) from the above decision, to the Provincial Court of Dacca, that Court concurred in opinion with the Zillah Judge, and affirmed his decree with costs against the appellant.

In this interval the original claimant (Ramkishwor) died, and was succeeded by the present respondent. On a further appeal by Nubkishen, to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington), his denial of the respondent's title was supported by the following documents, stated to have been discovered subsequently to the decree of the Provincial Court;

Claim by the father of the respondent, to a five ana share of an estate, in right of his uncle. Judgment in favour of the claimant, passed by the Zillah and Provincial Courts, reversed by the Sudder Dewanny Adawlut, on documents, proving the title of the party in possession, not discovered till after the decree of the Provincial Court.

1806. *1st, a salinama, or award of arbitrators, dated in the Bengal year 1186, by which disputes between different members of the family, respecting shares of the talook, were finally settled; 2nd, a written acknowledgment by the widow of Ramchunder, uncle of the respondent's father (the person in right of whom the present claim had been preferred), bearing also the counter-signature of Ramkishwor the respondent's father; acknowledging the partition papers of 1183 to have been unfair, and the execution of them to have been caused by undue means; and renouncing, in conformity with the above award of arbitrators, all title, in right of Ramchunder, to the five ana share. The production of these papers, in so late a stage of the cause, appeared suspicious. It was, however, proved to the satisfaction of the Court, that they had been accidentally found among papers in possession of the son of a deceased agent, who had been in the service of the appellant's father; and the oldness of their date might account for their having been unknown to the appellant, who, from his ascertained age, must have been an infant at the time they were executed. The evidence of subscribing witnesses, still surviving, taken by order of the Court, confirmed these documents, and proved, that previously to 1183, the father of the appellant was in possession of the five ana share, in right of inheritance from Kishenram, second son of the acquirer of the talook; that Ramchunder, having got possession in 1188, by intrigue with the zemindaree officers, retained it till his decease, at the end of the following year, and was succeeded by his widow, and Ramkishwor the respondent's father; and that the award of arbitrators in 1187 was carried into effect, by the share being restored to the appellant's father, as the legal heir and proprietor. The fact of the respondent's father having remained silent so long without possession, and without preferring any claim, appeared to the Court a strong additional proof that the adjustment took place as described. Under these circumstances, the Sudder Dewanny Adawlut admitted the documents as evidence in favour of the appellant, and considering it to be proved, that Ramchunder had no legal right to the five ana share, and consequently that the respondent's father, or the respondent, could have no claim as heir of that person, reversed the decrees passed by the Zillah and Provincial Courts, and declared the appellant entitled to retain possession of the share in dispute. The costs of the Sudder Dewanny Adawlut were made payable by the respondent, but not those of the Zillah and Provincial Courts, as the decrees of those Courts were considered to have been justified by the evidence before them. (a)*

(a) The satisfactory proof brought in this case, that material evidence in favour of the appellant was not discovered until after the decree of the Provincial Court, induced the Sudder Dewanny Adawlut to receive the evidence, which without such clear and unquestionable proof, would have been rejected, as liable to suspicion of fabrication.

KERUTNARAEN, Appellant,
versus
MUSSUMMAUT BHOBINESREE, Respondent.

1806.

Sept. 6th.

THIS was an action brought by Mussummaut Bhoinesree, in the Zillah Court of Dacca Jelalpore, to recover from Kerutnaraen an estate consisting of Tappa Dowlutpore, and an eight ana share of pergunnah Ikrapore, together with moveable property belonging to it. The value was estimated at 5,211 rupees. The circumstances of the case were these: the plaintiff was the daughter of Myaram, late zemindar of the lands in dispute, who, in consequence of apprehensions excited by the predictions of astrologers, respecting the duration of his own life, and that of his only son, gave a written authority to his wife, in the event of his own decease being followed by the death of his son without issue, to adopt another. The zemindar died soon afterwards, and shortly after his death, the son died also. The widow adopted the defendant, at the age of about eight years, with the usual legal ceremonies; and, on her decease, the defendant took possession of the estate. The question to be decided was, whether the adoption was legal. The plaintiff claimed the succession to the estate, alleging, that the title of the adopted son was not good in law, from his having been adopted at an age exceeding five years. The defendant pleaded that such adoption was legal and valid. The point was referred to the pundit of the Zillah Court, who gave an opinion, that "a boy who is under five years of age, and whose head has not been shaved, with the usual formalities, in his own family, is the fittest for selection; but that, if he be above the age of five, and the proper ceremonies of tonsure be performed in the family of the adopter, the selection is indeed improper, but the adoption is valid." In the present case, the tonsure of the defendant, and other accompanying ceremonies, being ascertained to have been performed solely in the family of the adopter, and not in that of his own father, the estate, under the above opinion, was considered by the Zillah Judge to be the legal property of the defendant, as adopted son, and the claim preferred to it by the plaintiff, was dismissed in the Zillah Court, with costs.

On appeal by the plaintiff from this decision to the Provincial Court of Dacca, the pundit of that Court gave an opinion, that the adoption of a child, when above the age of five years, is illegal; and stated the opinion of the pundit in the Zillah Court to be wholly erroneous. The decision of the Zillah Judge was in consequence reversed by the Provincial Court, and the estate adjudged to the claimant, or daughter of Myaram, with costs payable by Kerutnaraen.

On appeal by this person from the decision of the Provincial Court to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), the question of law was proposed to the pundits of this Court, from whose answer it appeared, that, according to the Hindoo law of Bengal, the adoption of a boy of above five years of age, though the selection be not laudable, is valid, provided the initiatory ceremonies (*sunakar*) have been performed in the family of

1806. the adopter, and not in that of his natural father. The authority to adopt a son having, in the present instance, been given by Myaram to his widow, only in the event of the death of the son then living, the pundits were further asked, at the instance of the respondent, whether this circumstance made any alteration in the opinion they had given. They answered that it did not. The Sudder Dewanny Adawlut, therefore, determined, in conformity with the opinion of their law officers, that the adoption of the appellant at the age of eight years, was valid, and entitled him to the estate. A final judgment was accordingly passed against the claim of the respondent. (a)

1806. MUSSUMMAUT BIJYA DIBEH, Appellant,
versus
 Sept. 26th. MUSSUMMAUT UNPOORNA DIBEH, Respondent.

Claim by the appellant, to a moiety of her father's estate, the whole of which was in possession of the respondent under a gift made by the appellant's mother after the father's death. The gift pronounced

THIS was an action brought by Bijya Dibeh, in the Zillah Court of Rajshahy, on the part of herself and of her son, a minor, to recover from Unpoorna Dibeh, a moiety of an estate consisting of "Kismut two anas pergunna Chundason." The *jumma* assessed on this moiety was stated at 614 rupees. The plaintiff was the eldest daughter of Kishen Kaunt, the late zemindar of the estate, who, shortly before his decease, having no male issue, gave a written authority to Tarni Dibeh, his wife, empowering her to adopt a son. After his death, she selected for adoption a boy named Kali Kaunt, having at the time two daughters by Kishen Kaunt, viz. the plaintiff, and Mussummaut Gunga Dibeh; which latter daughter had also a son. Kali Kaunt (whom the widow declared to have been actually adopted) died within a few months, and of course without issue; and the widow afterwards made a gift of the estate to Kali Bhyroo, the son (since deceased) of her younger daughter, and husband of the defendant. The plaintiff contended

(a) A very important question of Hindoo law was here finally determined. It had been previously agitated in other cases before the Supreme Government, formerly exercising a judicial authority in regard to the succession to zemindaries, and had been then determined on similar principles. But the question was now for the first time decided in the Sudder Dewanny Adawlut. A passage cited as an authority of law by the Hindoo writers whose works are current in Bengal, expresses, that, after the fifth year, a child should not be adopted by any of the forms of adoption, but that a person, desirous of making an adoption, should take a child of an age not exceeding five years. On this passage a question arose, whether the limitation of age was to be understood as positive, and constituting an indispensable requisite to the validity of the adoption; or whether it admitted of any latitude of construction. In other provinces, and even in Bengal, if the adoption be of a near relation on the paternal side, no difficulty would occur; as the adoption of a brother's son, or other nearest male relation of the husband, would be unquestionably valid, at an age much exceeding that specified. But in Bengal, where the adoption of strangers to the family is practised, the settled doctrine is, that the boy's age must be such, that his initiation, the principal ceremony of which is tonsure, may be yet performed in the adopter's name and family. Admitting, then, the authenticity of the passage, and its interpretation, (both of which are however contested,) the best authorities in Bengal acknowledge the restriction, as thus explained, and not as confined to the particular age of five years. Accordingly, in the case under consideration, the boy not having been previously initiated in his natural father's family, was held by the Court to have been legally adopted. .

that this gift was illegal, on the ground that, on the decease of Kali Kaunt, the widow, inheriting from him as the adoptive mother, was not authorized to make a gift of the estate, as the inheritance would, on her demise, vest in the plaintiff and her sister equally, both then having male issue living. The plaintiff accordingly claimed a half share. The defendant, who was in possession of the estate, as the widow and heiress of Kali Bhyroo, in whose favour the gift had been made by Tarni Dibeh the widow of Kishen Kaunt, pleaded, that the gift was valid, in consideration of the grounds for its being made, which were stated to be these, viz. that the plaintiff (the eldest daughter) who had no male issue at the time, was married to a person in affluent circumstances; whereas the younger sister (the mother of the donee), was a widow, and had not wherewithal to support her son; that this son, independently of being the only male heir of the family, then living, was deemed a proper object of charity; and that, under these circumstances, the widow of the zemindar made the gift in his favour, as a charitable donation, enjoined by maxims of religion, and calculated to benefit the soul of her departed husband. The pundit of the Zillah Court having been referred to for his opinion, whether, under the circumstances stated, the gift was valid, replied that it was not. The pundits of three adjacent zillahs were consulted on the point, and were of opinion that the gift was good in law, on the ground of its being a charitable donation by the widow, beneficial to the soul of her husband. The Judge of the zillah of Rajshahy, conforming to the opinion of the majority, considered the estate to have been legally conferred by the gift, on the husband of the defendant, and dismissed the claim preferred by the plaintiff to a moiety of it, with costs.

1806.

Musunn-
maut Bijya
Dibeh, v.
Musunn-
maut Un-
poorna
Dibeh.

On appeal by the plaintiff from the above decision to the Provincial Court of Moorshedabad, that Court concurred in it, and dismissed the appeal, with costs.

On a further appeal to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), this Court referred the question of law to their pundits; but as, on a review of the circumstances of the case, it appeared, that although the widow of the zemindar had certainly declared her adoption of Kali Kaunt, there was no satisfactory proof of the actual performance of the legal ceremonies, necessary to make the adoption valid, and it was therefore uncertain whether the widow, at the time of the gift to Kali Bhyroo, held the estate in right of her husband, or of her adopted son; and as this point might eventually be of consequence in the decision of the cause; the question as to the validity of the gift, under the Hindoo law of Bengal, was proposed to the pundits of the Court, in the following form; 1st, the widow of the zemindar Kishen Kaunt having, after the death of her husband, proceeded, in pursuance of authority previously received from him, to adopt a son; and the boy designed for adoption having died before the performance of the legal ceremonies; and the widow having made a gift of her husband's estate to the son of her youngest daughter, which gift the eldest daughter, who afterwards had a son, denies to be legal, claiming a half-share of the estate by hereditary succession; under these circumstances, is, or is not, the gift valid.

1806.

Mussum-
mant Bijya
Dibeh, v.
Mussum-
mant Un-
porna
Dibeh.

in law? 2nd, if the ceremonies of adoption were performed, and the boy selected by the widow was actually adopted, was the widow, after his decease without issue, authorized to make a gift of the estate? In answer to this reference, the pundits gave it as their opinion, that "a woman succeeding to the possession of property, in right of her husband, or of her adopted son, is not at liberty to alienate it without the consent of the legal heirs: or to settle it on one heir, while there is a possibility that a co-heir may be subsequently born." Under this opinion, whether the adoption of Kali Kaunt was valid, and the estate reverted to the widow as his heir, on his dying without issue; or whether the adoption was not valid, and she held the estate in right of her husband; the Court considered the gift of the estate, made by the widow in favour of the respondent's husband, to be void; and determined that, on the decease of the widow (which took place during the present suit), her two daughters, viz. the appellant, and Gunga Dibeh, mother of the respondent's husband, both having male issue at the time, were entitled to equal shares of the estate as the legal heirs, and, consequently, that the appellant was entitled to the moiety which she claimed. The decrees passed against the claim by the Zillah and Provincial Courts, were in consequence reversed by the Sudder Dewanny Adawlut, and final judgment given in favour of the appellant, with costs against the respondent. (a)

(a) An intricate question of Hindoo law was determined in this case, relative to the power of a widow, on whom property has devolved by the death of her husband or of her son, to alien it by gift without the consent of the heir at law. The disagreement of the opinions of the pundits arose from the following considerations. The succession to property which has devolved on a widow, passes to daughters, for the sake of the male issue, which they have, or may have. The son of the youngest daughter (the eldest being then childless) was therefore the person contemplated in the inheritance. A gift to him might be deemed beneficial to the deceased, and consequently legal; or, the donation in favour of him, who finally was to be heir in regular succession, could not be considered as made against the consent of heirs, since his consent to a gift in his own favour might be assumed. In the present instance the presumption was, that a son had been adopted by the widow, and that the estate consequently reverted to her on his decease without issue: it was therefore a case of property devolving on a mother by the decease of her son; and it was questioned whether a woman was restricted from aliening land so inherited by her. The law officers of the Sudder Dewanny Adawlut dissented from the doctrine which maintains the woman's right of alienation, and held, that the rules concerning property devolving on a widow, equally affect property devolving on a mother. In both cases the woman is restricted from aliening, unless for her necessary subsistence, or for pious purposes, beneficial to the deceased; and that only to a moderate extent. A gift of the whole property does not fall within the exception. Nor could this donation be considered as one made in favour of the heir at law, the immediate heirs being the daughters; and the exclusion of the further issue, which might be born between the period of the gift and that of the woman's demise, being illegal. They were therefore of opinion, that the gift was void, and that the succession devolved on the two daughters, both of whom had male issue at the time of their mother's decease.

MANIKCHUND BUNOJA, Appellant,

1806.

versus

RAJA GOORONARAEN, Respondent.

Sept. 19th.

THIS was an action brought by Raja Gooroonaraen against Manikchund Bunoja and one Ramssoondur Mitre, in the Zillah Court of Ramghur, on the 13th of January 1802, to cancel a certain bond and written engagement, as illegal, and to recover the sum of 225 rupees, as excess exacted from the plaintiff above the principal and legal interest of a loan. The plaintiff was a zemindar in the district of Ramghur. It was stated in the plaint, that, on the 2nd of November 1796, the revenue payable by him, having fallen into arrear, a loan of 4,001 rupees was procured for him, or rather indirectly advanced to him, by the defendant Ramssoondur, at that time dewan to the Collector of the district, for which his bond was taken, in favour of the other defendant Manikchund, bearing the usual interest of twelve *per cent*; that, however, he was forced to agree privately with Ramssoondur to pay twenty-four *per cent*; and that, at the end of the following year, the interest having been calculated at this rate, together with four years interest in advance, a bond, also in favour of Manikchund, for 8,401 rupees, purporting to be the just balance, was brought to the plaintiff for signature, together with an engagement in writing that the amount should be discharged by instalments within four years, from the profits of lands belonging to the plaintiff, to be assigned for the purpose; and that the plaintiff was forced to sign the documents by Ramssoondur. The plaintiff asserted, that under such circumstances, the bond and engagement were illegal, and not binding on him; that all just claims under the original bond had been liquidated from the produce of the lands; together with an excess of the sum of 225 rupees, specified in the claim, which the plaintiff sued to recover. The defendant, Ramssoondur, denied any concern in the transaction; and the other defendant, Manikchund, stated himself to be the only person concerned. He alleged the statement of the plaintiff to be unfounded; and pleaded, that, besides the loan of 4,001 rupees, a further sum of 3,245 rupees, had been advanced to the plaintiff; that the balance of principal and legal interest formed the amount of the bond of 8,401 rupees; and that a small part of it only had been liquidated. This bond, in favour of the defendant Manikchund, together with the engagement for assigning the produce of the plaintiff's lands for the payment, being produced, and the execution of them proved, by the defendant; and it appearing that a former judgment, for the first instalment, had been obtained against the plaintiff by the defendant Manikchund, and that the present action on the part of the plaintiff was not brought till nearly four years after the signing of the bond, whereas, had the signature been compulsively obtained, it appeared to the Zillah Judge that redress would have been sought immediately, it was his opinion, that the bond was good and valid; and as the only payments found to have been made by the plaintiff, were 4,071 rupees, leaving a considerable balance of principal and interest unpaid, it was pronounced that the plaintiff's action could

1806. not be maintained; and judgment was accordingly given against him in the Zillah Court, with costs.

Manik-chund Bunoja, v. Raja Goo-roonarach. On appeal by the plaintiff from the above decision to the Provincial Court of Patna, that Court did not at all concur in it. It appeared to the Provincial Court to be proved by evidence for the claimant, that no more than the original sum of 4,001 rupees had been advanced to him; that the amount of the second bond, as alleged by him in the Zillah Court, was occasioned by anticipated and illegal interest, added to the first one; and that his signature to this bond was obtained by undue means, through the official influence of Ramsoondur, the dewan to the Collector; and it was evident that Ramsoondur was the principal in the transaction under the name of Manikchund. The delay, on the part of the claimant, in bringing the present action, which the Zillah Judge assumed as a ground for disbelieving the bond to have been compulsively taken, appeared to the Provincial Court to be accounted for, by its appearing that, at the time, the offices of Judge and Collector of the district were united in the same person; under which circumstances it was extremely probable, that an undue exertion of Ramsoondur's influence, unknown to the Judge and Collector, might have deterred the claimant from bringing his action for redress. Independently of the bond being considered invalid as compulsively taken, it being specified in section 2, of regulation 19, 1793, that the Dewan of a Collector is prohibited from lending money, directly or indirectly, to any landholder in his district, and that money so lent shall not be recoverable in the Civil Courts; the Provincial Court judged the bond in question to be void on this ground, as well as the engagement for its liquidation by instalments. So much of the decree of the Zillah Judge as upheld the bond for 8,401 rupees, was therefore reversed by the Provincial Court; but as it did not appear that the payments made on the part of the claimant, exceeded the principal and legal interest of the sum of 4,001 rupees, actually advanced to him, the excess claimed by him was not adjudged by the Provincial Court; and it was merely decreed, that the bond and engagement for its liquidation should be surrendered and cancelled.

An appeal from the above decision was brought to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle) by Manikchund, who denied the grounds on which the Provincial Court had decided, and especially the circumstance of Ramsoondur having been a party to the transaction. The Sudder Dewanny Adawlut however entertained the same opinion on the case as the Provincial Court of Appeal: the Court observed, that there was no proof of the advance of any other sum to the respondent than the original loan of 4,001 rupres; that the bond for 8,001 rupees was evidently taken by undue influence under the impression of fear; and that the appellant, who, it appeared, was at the time a dependant of Ramsoondur, and through his interest, was employed as a writer in the Collector's office, could not, from his means, and situation in life, be supposed with any probability to have been the principal in the transaction. The decree of the Provincial Court was therefore finally confirmed by the Sudder Dewanny Adawlut, and the appeal dismissed with costs.

PETUMBER GHOSE, Appellant,

1806.

versus

GHUREEB OLLAH, Respondent.

Oct. 3rd.

THIS was an action brought by Petumber Ghose, in the Zillah Court of Jessore, on the 5th of January 1802, to recover from Ghureeb Ollah the lands of Deh Satgatcha, &c. estimated to produce an annual value of 10,000 rupees. These lands formed a part of the estate of the late Govind-deo Rai, consisting of 3½ anas of pergunnah Mahmoodshahi, which in the year 1800 was sold at auction by the sheriff of Calcutta, under a writ of the Supreme Court, in satisfaction of a judgment against the zemindar, and was purchased by the plaintiff, to whom the defendant refused possession of the lands in question, alleging that a previous mortgage had been given to him on them in May 1796, by the late zemindar, for the sum of 5,000 rupees, with an eventual condition of sale if the amount were not repaid within a certain time; and that, in consequence of the amount not being repaid within the time agreed on, he had obtained a judgment against the zemindar for the lands, in the Zillah Court, and held them accordingly. The plaintiff denied this mortgage to be valid, on the ground that it was given while the estate was under attachment by the Supreme Court. This being proved on the part of the plaintiff by an extract from the sheriff's books, from which it appeared that the seizure was made in 1792, and in July 1798 had not been withdrawn; and it being in consequence the opinion of the Zillah Judge, that the defendant had no legal right under the mortgage, but that the plaintiff, under his purchase at the sheriff's sale, was entitled to the lands in question, as well as to the rest of the estate, judgment was given for the plaintiff in the Zillah Court, with costs against the defendant.

On appeal by the defendant from the above judgment to the Provincial Court of Calcutta, that Court did not concur in it. It was proved to the Provincial Court that the claims on the estate of the late zemindar, which occasioned the seizure of 1792, were all liquidated on or before the 24th of April 1796, at which time, consequently, the attachment ought to have been withdrawn; and it appeared that the mortgage of the lands in question was given by the late zemindar to Ghureeb Ollah on the 19th of May 1796, twenty-four days after the date abovementioned; and that a judgment for the lands was obtained in 1798, in the Zillah Court of Jessore, under the conditions of the mortgage. The Court had strong suspicions that the continuance of the attachment on the estate was collusive on the part of the late zemindar, with the intent of defrauding Ghureeb Ollah, his mortgagee. Proofs of collusion on his part, appeared in a mortgage deed purporting to have been executed by him for the whole estate, and dated in 1791, which, if really executed at that time, would have invalidated the mortgage to Ghureeb Ollah, but which was found to have been several years antedated. Under these circumstances, as the mortgage of the lands in question by the late zemindar to Ghureeb Ollah, was subsequent to the date on which the attachment ought

1806.

Petumber
Ghose, v.
Ghureeb
Ollah.

to have been removed from the estate; and as no proof was adduced by Petumber Ghose, that any other attachment had at the time been placed on the estate; it was held by the Provincial Court, that the mortgage to Ghureeb Ollah, under the conditions of which he had obtained a former judgment for the lands in question, and held possession under that judgment, was legal and valid; and that the purchase of the claimant, at the sheriff's sale, could not prevail against it. The decree passed by the Zillah Judge in favour of the claim, was therefore reversed by the Provincial Court, and the costs, as well as those in the Zillah Court, made chargeable to the claimant.

On appeal by the claimant from the above decision, to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), this Court concurred in the judgment passed against the claim. The Court observed, that the claim rested on the ground that the mortgage to the respondent was illegal, as having been given while the estate was under a legal attachment by the Supreme Court; which was not shewn. And as it appeared to the Court, that the sheriff's sale of the estate took place in consequence of a different demand, and in execution of a different judgment from that under which the original seizure was made, it was observed, that, even had the mortgage been given during the original seizure, it could not have been affected by any claim on the part of the purchaser at the sheriff's sale. The decree passed against the claim, by the Provincial Court, was therefore finally confirmed by the Sudder Dewanny Adawlut, with costs against the appellant.

1806.

Dec. Ist.

BEIJNATH SAHOO, Appellant,

versus

VIZEER SING, Respondent.

Claim to the recovery of an estate, mortgaged with conditional sale, to become absolute at the end of a term, now expired. Judgment for the mortgager, on proof that offers of clearing the mortgage were made within the term, and

ON the 31st of December 1791, pergunnah Futihpoor, &c. an estate belonging to Vizeer Sing, bearing an annual assessment of 4,247 rupees, and yielding a considerable profit to the proprietor, was mortgaged by him to Beijnath Sahoo and another, for the sum of 11,262 rupees, on deeds of *bye-bil-wafa*, or mortgage and conditional sale, redeemable within two years. The period expired without the mortgage being redeemed by payment of the whole amount; but part of it had been realized by the mortgagees from the usufruct, and the mortgager alleged, that, before the stipulated period expired, he offered to pay the balance in cash, and settle the accounts, but that a settlement was evaded by the mortgagees. On this ground the present action was brought by the mortgager, in the Zillah Court of Behar, on the 22nd of April 1796, or 30th of *Cheit* of the *Faslee* year 1203, to redeem the estate, and to recover from the mortgagees the sum of 292 rupees, as realized by them from the usufruct, in excess of the principal and legal interest of the sum advanced. On the part of the plaintiff, besides the statement of the tender of cash, it was alleged, that, of the sum of 11,262 rupees, specified in the deeds as the amount for

which the mortgage was given, 10,400 rupees, only, had been received by the plaintiff, and was the full amount of principal due on the mortgage. The defendants pleaded, that the whole amount was advanced; that no tender of payment was made within the time limited; and that the estate had become their property, under the stipulations of the mortgage and conditional sale. As the estate had not been actually redeemed by the mortgagor within the stipulated time, the Zillah Judge considered the sale to have become absolute to the mortgagees; and judgment was given in the Zillah Court against the claim of the mortgagor, with costs. 1806.

On appeal by the mortgagor from the above decision to the Provincial Court of Patna, that Court did not concur in it. From a petition presented by the mortgagor to the Collector of the district, and an order passed on it, bearing date about six weeks before the term of the deeds expired, it was proved to the satisfaction of the Provincial Court, that a public application was then made by the mortgagor, for having the accounts of the mortgage settled, in consequence of a settlement being evaded by the mortgagees: and as the Court was satisfied that the non-payment of the amount within the stipulated time, did not proceed from omission of the mortgagor, but from evasion on the part of the mortgagees, in order to render the sale absolute, it was held, that the mortgagor was still entitled to the redemption of his estate. Of the sum of 11,262 rupees, the amount for which the deeds were executed, it had been alleged by the mortgagor, that 862 rupees were not paid to him; and this appeared to the Provincial Court to be established on the evidence of a letter from the mortgagor's agent, to whom the money had been remitted on his account, for the liquidation of certain debts, and whose letter stated the whole amount received to be 10,400 rupees, the balance after deducting the abovementioned sum. This balance, therefore, was deemed to be the full amount of principal due on the mortgage; and the Court, on examining the accounts of the estate, while in possession of the mortgagees, proceeded to frame an adjustment, by calculating, in each year from the date of the mortgage, the amount due on it, with interest on one side, and the amount realized from the lands on the other. By this calculation, it appeared that the debt annually decreased, until, in the middle of 1208, the whole was liquidated; and, by the sums realized on the part of the mortgagees, from that time till the end of 1209, (the date on which the cause came in appeal before the Provincial Court), it appeared that there was an excess, including interest, received by the mortgagees, amounting to 5,973 rupees. This sum was accordingly adjudged to the mortgagor by the Provincial Court, together with the recovery of the estate, and costs against the mortgagees.

In this interval Runjeet Sing, one of the mortgagees, having died, the other (Beijnath Sahoo) purchased from his heirs their joint interest in the cause, and appealed from the above judgment to the Sudder Dewanny Adawlut. This Court concurred in the judgment, except in regard to the sum of 862 rupees, deducted, as not received by the mortgagor, from the amount of the principal due on the mortgage. By the evidence of a person who had been concerned in the remittance of the money, and who more-

1806. over was one of the respondent's own witnesses, it was clearly shown, that this part of the loan had been advanced, though not exactly at the same time as the rest. This sum therefore, with interest from the date of the mortgage, being deducted from the sum decreed in favour of the mortgagor by the Provincial Court, left a balance due to him of 400 rupees. The decree of the Provincial Court was accordingly amended by the Sudder Dewanny Adawlut, and the sum of 400 rupees was finally adjudged to the respondent, or mortgagor, as the excess due to him from the appellant, or mortgagee, at the end of 1209: together with possession of his estate, and the mesne profits which had accrued on it between the above period and the date of the final decree. The costs in the Sudder Dewanny Adawlut were made payable by the parties respectively.

1806. RAMRUTUN DAS, Appellant,
versus
 Sept. 26th. BUNMALEE DAS, Respondent.

Claim to recover *lakhiraj* lands which had been held by the late principal of a religious establishment. Judgment for the claimant, on proof that he was duly appointed successor to the late principal.

THIS was an action brought by Bunmalee Das, in the Zillah Court of Tirhoot, on the 24th of July 1801, or 10th of *Srawun* of the *Fusslee* year 1208, to recover from Ramrutun Das the *lakhiraj* mouzas Choorcot, Buram, &c. estimated to produce an annual value of 501 rupees. The parties were of the *Sunyasi* sect. The contested lands were situated in Tirhoot, and had belonged, in virtue of his office, to Jykishen Das, the late *mohunt* of a religious establishment, situated partly in Tirhoot and partly in Nepal. Each of the parties was a *Chela*, or pupil of this person, and each alleged having been appointed his successor. It was stated by the plaintiff, that, on the *mohunt's* decease, in the *Fusslee* year 1201, he was elected his successor in Nepal, at the *bundhara*, or funeral obsequies, at which it is customary for the election to be declared; that, in 1203, he appointed Cheitun Das, the pupil of the defendant, to the charge and management of the lands in question, of which, in that year, he transmitted the produce and accounts to the plaintiff, but in the beginning of 1204, thought proper to declare the defendant proprietor. The defendant pleaded, 1st, a gift to him by the late *mohunt*, in 1197, of mouza Chooroot, one of the principal portions of land attached to the institution, which gift the *mohunt* was alleged to have conferred with a view to make known his intention of nominating the defendant to succeed him; 2nd, that at the celebration of the funeral obsequies, in Nepal, the plaintiff had, by undue means, prevented the defendant from being declared successor, according to the intention of the *mohunt*. The principal documents produced in evidence by the plaintiff, were, 1st, an official letter from the Raja of Nepal, approving the nomination of the plaintiff as successor to Jykishen; 2nd, a written engagement of Cheitun Das (pupil of the defendant), accepting from the plaintiff the office of agent for the management of the lands; 3rd, accounts of produce submitted by Cheitun Das to the plaintiff. The defen-

dant produced the following documents: 1st, a *sunnud* from 1806. Raja Madhoo Sing, zemindar of Tirhoot, acknowledging the defendant as successor to Jykishen, for the part of the establishment situated in his zemindaree; 2nd, a corresponding *purwana* from the Collector of Tirhoot, confirming the *lakhiraj* lands to the defendant, as Jykishen's successor. It did not appear, however, to the Zillah Judge, that these documents could at all establish the defendant's title, without proof of his having been elected by the assembly of *mohunts*, with whom the nomination rested; and his plea of the gift of mouza Chooroot in 1197, was disproved by the evidence of his own witnesses, from which it appeared that this mouza was held by the *mohunt* himself until the period of his decease. The evidence of respectable persons, for the plaintiff, agreed in the following circumstances, viz. that the different portions of land, situated in Tirhoot and Nepal, were all attached to the same institution, and that the establishment in Tirhoot was subordinate to that in Nepal; that the late *mohunt*, a short time before his decease, in the presence of all his pupils, and of various persons of the order, nominated the plaintiff to succeed to his office of *mohunt*, and to the lands attached to it; that, shortly after the decease of the *mohunt*, which happened in the same year, in Nepal, the principal persons of the order, together with the pupils of the deceased, and the *mohunts* of the surrounding district, were convened, for performing the obsequies; and that, after the accustomed ceremonies, they declared the plaintiff successor to the deceased, and installed him as principal of the establishment. On this evidence, and on proof that, according to the engagement produced by the plaintiff, the charge of the lands in question had been accepted from him by the pupil of the defendant, it was the opinion of the Zillah Judge, that the plaintiff was the person legally entitled to possession of them as the authorized successor; and judgment was accordingly given in his favour in the Zillah Court, with costs against the defendant.

On appeal by the defendant from the above decision to the Provincial Court of Patna, and finally to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), those Courts respectively concurred in it, and dismissed the appeal with costs.

Ramratan
Das, v.
Bunmallee-
Das.

1806.

MUNROOP RAI, Appellant,

versus

Dec. 22nd.

RAMJEE BUNOJA, and BANIKAUT RAI,
(Heir of SRIKAUNT RAI, deceased), Respondents.

Claim by the appellant to a dependant talook, forming part of a zemindaree purchased at auction by the first respondent, on the ground of a previous purchase of the talook from the former zemindar. The previous purchase, made during an attachment of the zemindaree for the public sale, declared invalid against the purchaser at the public sale, but obligatory on the former zemindar and his heir, in the event of the public sale being set aside.

Construction of section 2, regulation 44, 1793, with respect to engagements fixing the rent of dependant talooks in opposition

THIS was an action brought by Munroop Rai in the Zillah Court of Jessore, on the 7th of August 1798, against Ramjee Bunoja and Srikaunt Rai, to recover a talook, consisting of the mouza Mahadeopoor, &c. eleven in number. The *jumma*, or annual rent payable to the zemindar, was 4,398 rupees. The mouzas were situated in pergunna Saedpore, late the zemindaree of the defendant Srikaunt Rai, which pergunna was purchased by the defendant Ramjee Bunoja, in October 1797, at a public sale made by the Sheriff of Calcutta, in satisfaction of a judgment of the Supreme Court; and the defendant had been put into possession accordingly. The plaintiff claimed the lands in question as his talook, under a previous purchase from the late zemindar, made on the 27th of January 1797. The defendant Srikaunt Rai having pleaded that the claim attached only to the purchaser of the zemindaree, and that he was not concerned in the cause, the Zillah Judge permitted him to withdraw. The remaining defendant pleaded, that the private sale of the lands in question to the plaintiff, was invalid, alleging, that it was made during an attachment of the zemindaree, with a view to defraud the public purchaser. The plaintiff having proved his purchase of the lands, by a receipt for the purchase money from the late zemindar, and by a *pottah* under the seal of the zemindar, granting him the lands on a lease in perpetuity, at a specified rent, in consideration of a sum paid for the purchase of the tenure; and the late zemindar having declared that the zemindaree was not under attachment at the date of the sale of the lands in question; the Zillah Judge, not seeing any fraud or irregularity in the sale, was of opinion that the plaintiff was entitled to hold the lands as a dependant talook, paying rent to the proprietor of the estate; and judgment was accordingly given in his favour, in the Zillah Court. The costs were made payable by the parties respectively.

On appeal by the defendant (the purchaser at the sheriff's sale) from the above decree to the Provincial Court of Calcutta, that Court did not concur in it. Suspicions were entertained by the Provincial Court, that the private sale was fraudulent; and, at all events, it was considered, that the lease in perpetuity, granted by the late zemindar, was illegal, under the rules contained in the 2nd section of regulation 44, 1793, which direct, that no zemindar shall dispose of a dependant talook to be held at the same *jumma*, or fixed rent, for a longer period than ten years, and declare null and void any engagement fixing the *jumma* of a dependant talookdar in opposition to such prohibition. If the plaintiff had been injured, and was entitled to reparation, the Court observed, that his action could only lie against the zemindar, who made the private sale to him, and not against the public purchaser of the zemindaree; and that the Zillah Judge had acted erroneously in not including the late zemindar, as a party, in his decree. The

decision passed by the Zillah Judge in favour of the claimant, and against the public purchaser, was therefore annulled by the Provincial Court, with an option to the claimant to sue the late zemindar in a separate action. Reimbursement of costs was at the same time ordered to be made to the public purchaser. 1806.
to the rule
there laid
down.

On appeal by the claimant from the above decision to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), as the late Srikaunt Rai had been sued in the cause in the first instance, it appeared proper to the Court to summon his representative; and accordingly, Banikaunt, his heir, attended, and pleaded as one of the respondents in the cause. The Sudder Dewanny Adawlut did not see reason to suspect the private sale to the claimant, to have originated in fraud on the part of the late zemindar; and the Court remarked, that, under the 2nd section of regulation 44, 1793, adverted to by the Provincial Court of Appeal, though the lease, as fixing a rent in perpetuity, was in so far invalid, it did not follow that the sale of the dependent talookdaree tenure should on the same account be void. But the first respondent (the purchaser at the public sale) having proved, by an extract from the records of the sheriff's office, that, at the date of the private sale of the talook in question to the appellant, the zemindaree was actually under the attachment, which ended in the public sale of it to the above respondent, the Court held, that the private sale of the talook, during the attachment of the zemindaree, was invalid against the right of the purchaser of the zemindaree, and consequently concurred with the Provincial Court of Appeal in determining that the present claim, as far as related to the public purchaser, was not admissible. At the same time, the Court having learnt that Banikaunt, the second respondent, had brought an action in the Supreme Court, to set aside the sheriff's sale of the zemindaree; and that, although no final decision had yet taken place, an order of Court had been passed favourable to his claim; it was declared, that, in the event of the sale of the zemindaree being set aside by the Supreme Court, and of Banikaunt being restored to possession of his father's estate, the appellant would be entitled to possession of the lands in dispute as a dependent talook, under the sale of that tenure made to him by the late zemindar; or, if the public sale were not set aside, would be entitled to receive back with interest, from Banikaunt, as the late zemindar's heir, the purchase money of the talookdaree tenure. Final judgment was therefore given by the Sudder Dewanny Adawlut, confirming so much of the Provincial Court's decree, as dismissed the claim against the first respondent; but the appellant was at the same time permitted, in the event of the second respondent not satisfying him in either of the modes pointed out, to sue him for possession of the talook, or for recovery of the purchase money. (a)

(a) The final decision on this cause was partly founded on the principle, that the owner of an estate, disposing of part of it as a dependent tenure, while the estate is under attachment preparatory to a public sale, binds himself and his heirs by such a disposal, in the event of the attachment being subsequently withdrawn, or the public sale, if made, being set aside, and the estate restored to the original owner, or his legal representative; though, if the public sale, for

1807.

COLLECTOR OF MOORSHEDABAD, Appellant,

versus

Jan. 16th.

BISHENNATH RAI and SHEONATH RAI, Respondents.

On a claim by the collector of Moorsheadabad, on the part of Government, for the right of assessing certain lands, held exempt from revenue as *dewuttur*, part of them adjudged to be assessable, as held under incompetent grants. The remainder considered to be legally *lakhiraj*, as having been granted before the Company's acquisition of the Dewanny.

THIS was an action brought in the City Court of Moorsheadabad, by the Collector of the district on the part of Government, on the 31st of December 1802, against Bishennath and Sheonath Rai, for the right of assessing certain lands held exempt from revenue under the title of *dewuttur*, to the extent of 4,536 beegas. The annual produce was estimated at 2,468 rupees. These lands were situated in Fyazabad, and other adjoining pergunnas, and had been granted as an endowment, by Ranee Bhuwani, formerly zemindar of Rajshahy, for the service and worship of certain idols, and set apart from her zemindaree as *dewuttur*, exempt from revenue, the direction and superintendence of the religious establishment being however reserved to herself and her family. The zemindaree in which the lands are situated had been since sold; and, on a question arising respecting the right of holding the lands distinct from the zemindaree, the Collector was directed by the Board of Revenue to institute a suit for trying the validity of the tenure, and for the ultimate assessment of revenue on the lands. The claim which was accordingly preferred against the defendants (grandsons of the Ranee), was made on two grounds, 1st, that, by the 3d section of regulation 19, 1793, grants for holding lands exempt from the public assessment, made, without the sanction of Government, since the date of the Dewanny (August 1765), are declared invalid, under which rule the greater part of the lands in question were alleged to be assessable; 2nd, that the produce of the lands in question had been appropriated to private uses, and that the Ranee, in retaining to herself and family the superintendence and management, was in fact both the grantor and grantee; under which circumstances the grants could not be deemed valid. The defendants (one of whom, Sheonath, had the superintendence of Ramachundra, one of the principal idols), pleaded, that the lands had been appropriated to religious purposes by the former zemindars of Rajshahy, before the Company acquired the Dewanny: that a *firman* confirming such appropriation had been obtained

which the attachment was made, take place, and remain in force, any transfer or lease, made by the late proprietor during the attachment, is not valid against the public purchaser. The decree of the Sudder Dewanny Adawlut recognizes an important distinction, in the construction of section 2, regulation 44, 1793, between the engagement for the *jumma* or rent, and the tenure of the land for which such rent is engaged to be paid. The declared object of that regulation being to prevent leases of dependent talooks or other under tenures for a long term, or in perpetuity, at a reduced rent; while it was at the same time expressly declared in the 7th section, that "nothing contained in this regulation shall be construed to prohibit any zemindar, independent talookdar, or other actual proprietor of land, from selling, giving, or otherwise disposing of any part of his lands, as a dependent talook;" the Court (as it had before done on a reference of the question from one of the Zillah Judges, in May 1798) considered the engagement for the fixed rent, only, to be declared void by the rule contained in the 2d section of the regulation, without the right of tenancy in the land, as stipulated between the parties, being in any other respect affected. The same principle of construction is applicable to all remedial laws, which are to be interpreted with a view to the intended remedy, and its advancement.—(*Blackstone*, Vol. 1, p. 87.)

from the Emperor Shah Aulum; and that no part of the lands was subject to the public assessment. From the circumstances of the Ranee having held the management of the lands, and reserved to herself the appointment of the officers of the several temples; and from its appearing that the rents were regularly remitted to her until her decease; the Zillah Judge, considering the grant of the *dewuttur* lands in the light of a grant to herself, and a fraud on the public revenue, was of opinion, that the grants were not valid, with the exception however of 699 beegas, assigned for the service of certain idols at Benares, against the tenure of which no objection was considered to lie. The remainder were accordingly declared liable to assessment, and so adjudged in the Zillah Court, with costs against the defendants.

1906.

Collector of
Moorshedabad, v.
Bishennath
Rai and
Sheonath
Rai.

On appeal by the defendants from the above decision to the Provincial Court of Moorshedabad, it appeared to that Court, that, although the rents of the greater part of the lands might have been remitted to the Ranee, there was sufficient proof, from the evidence of the witnesses of both parties, that the religious expenses for which they were appropriated, had been defrayed out of them; and there was no proof adduced of their having been misapplied. The Court observed, that the only point to be considered in the case was the time at which the several portions of land, alleged by the claimant to be legally liable to assessment, were assigned to pious uses. And it appearing to the Court that 888 beegas had been assigned to the idol Ramchundra, subsequently to the date of the Dewanny, and were consequently liable to resumption, but that the rest were held as *dewuttur* before that period; judgment was passed, declaring the above 888 beegas, only, liable to assessment, and directing that the settlement should be made with Sheonath Rai, as the *shewayut* or superintendent hitherto in charge of them. The costs in the Provincial Court were made payable by the parties respectively.

On appeal by the Collector from the above decision to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), this Court concurred in the general grounds of it. But, on a further investigation respecting the periods at which the several portions of the lands in question were appropriated to religious uses, it was found, that, besides those adverted to by the Provincial Court, the following had been assigned subsequently to the period fixed by the regulations for rendering such appropriations invalid; namely, in pergunna Fyazabad, assigned to the idol Gopaul Thakoor, 100 beegas; to the idol Raj Rajesree Thukraen, 423 beegas; and, in pergunna Kunwur Putta, to the idol Tarakesur, 35 beegas; total 568 beegas. Final judgment was accordingly given for the assessment of these lands, in addition to those adjudged liable to assessment by the Provincial Court: and with an order that a settlement should be made for them with the possessors, in the mode prescribed by the regulations. The costs in the Sudder Dewanny Adawlut were made payable by the parties respectively. (a)

(a) It may be remarked, as incidental to this decision, that lands held by a zemindar for a religious appropriation of which he has the superintendence, are not considered to form part of the zemindaree, provided the endowment is valid

1807. COLLECTOR OF DINAJPOOR, and KISHEN KAUNT RAI,

Appellants,

Jan. 23rd.

versus

GORCHUND SURMA, Respondent.

On a claim by A to hold, at a fixed rent, certain lands in a *mehal* purchased at public sale by B, judgment for A, on proof of an hereditary right to the tenure. B declared at liberty to relinquish his purchase, in consequence of the rent these lands having been erroneously described at the time of sale.

THIS was an action brought by Gorchund Surma, in the Zillah Court of Dinajpoor, on the 4th of June 1802, to recover from Kishen Kaunt Rai the mouzas Ramnugur and Nunya Tikore, situated in pergunna Deeora. It appeared, that, at the sale of certain parts of the zemindaree of Dinajpoor, in satisfaction of arrears of revenue due from the zemindar, two *mehals*, or lots, containing, among other lands, the mouzas in question, were purchased by the defendant Kishen Kaunt Rai. In the detailed statement of the particulars of the lands to be sold, exhibited, as usual, at the time of sale, for the information of persons wishing to purchase, the mouzas in question were specified as common *malguzaree* lands, bearing a *jumma*, or annual rent, one of 837, and the other of 1,083 rupees; and, on the faith of these statements, the purchase of the two lots was made by the defendant. The plaintiff, however, alleged a right of holding the mouzas at a fixed and perpetual *jumma* of 575 rupees, under an *istimraree* grant to his father from a former zemindar of Dinajpoor; and accordingly brought the present action to recover possession on that tenure. From documents brought forward by the plaintiff, it was proved, that in the year 1763, Baidnath Rai, then zemindar of Dinajpoor, granted seven mouzas, two of which are those in question, to Olyechund, the father of the plaintiff (at that time priest to the Raja's family), on a tenure termed *birt ijarah*, at a perpetual *jumma* of 575 rupees: that, in 1770, the province having suffered during the general famine, and the grantee finding difficulty in the cultivation of the mouzas, the Raja agreed to annex them to his *nij talooks*, or private lands, giving at the same time an agreement in writing, to the plaintiff's father, to continue to him his tenure, and to pay the profits, regularly, after deducting the public revenue and incidental charges; that, further, on the 28th of March 1776, a decree was passed by the Superintendent of the Adawlut of Dinajpoor (in a cause wherein the plaintiff's father sued the Raja, in consequence of part of his profits being withheld by the Raja's *gomashtha*), decreeing to him the full profits; acknowledging his rights as above stated; and specifying that the tenure of the lands was ascertained to belong to him; that they were only in charge of the Raja; and that possession of them was at any time demandable. It further appeared that Baidnath Rai, and his successor the late zemindar had annually paid to the plaintiff's father, and to the plaintiff, the profits of the mouzas, until the sale of their zemindaree; and, in the papers relating to the decennial settlement, the *jumma* of the two mouzas was rated at the amount at which the plaintiff claimed to hold them. Under these circumstances the Zillah Judge being of opinion that the plaintiff was entitled to

under the regulations; also that the zemindar having made such endowment, does not invalidate it, if antecedent to the dewanny grant.

hold the lands at the *jumma* stated, on an *istimraee* tenure, judgment was given in his favour in the zillah Court, with costs against the defendant. 1807.

On appeal by the defendant, in conjunction with the Collector of the district, from the above decision to the Provincial Court of Moorsheedabad, that Court concurred in it, and dismissed the appeal. It was at the same time ordered, that the defendant should account to the plaintiff for the meane profits during the time the lands had been in his possession. Collector of Dinaj-poor, and Kishen Kaunt Rai, v. Gorchund Surma.

A special appeal from the above decision having been admitted by the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), on the motion of the Collector, the principal plea urged by him before this Court, was, that, from the tenure of the mouzas not having been conferred under any of the titles by which the occupancy of land is usually defined, but by the peculiar term *birt ijareh*, it must have been intended, that the grantee should possess only an income in money arising from the produce of the lands, and that the grant appeared to have been only a personal allowance to the respondent's father, as priest to the Raja, and not a grant which ought to be continued to the respondent, who had never held the office; especially now that the office had ceased. The Sudder Dewanny Adawlut, however, on full consideration of the case, held, that the grant must be construed to convey a tenure inheritable by the heir of the grantee, and not as a personal grant, or one of pecuniary provision; and that the respondent, by right of inheritance from his father, was entitled to hold the lands at the *istimraee jumma* specified in the grant. The decree passed in favour of the claimant by the Provincial Court, was therefore affirmed by the Sudder Dewanny Adawlut, and the appeal dismissed with costs. With respect to the purchase made at public sale, by the appellant Kishen Kaunt Rai, of the *mehals* in which the *birt ijareh* lands of the respondent are situated, it was pronounced by the Sudder Dewanny Adawlut (in concurrence with the Board of Revenue) that the appellant was at liberty to relinquish his purchase, in consequence of the error in the public statements, on the faith of which it was made. The appellant, however, having declined taking advantage of it in the present case, no provision was made for it in the decree. (a)

(a) The option possessed by purchasers at the public sales to relinquish their purchases on the discovery of any material error in the description of the lands sold to them, was noticed in the case of Doorgapershad Bose, v. the Collector of the twenty-four pergunnas, August 18, 1806. But this is the first instance in which the right in question, founded on an obvious principle of equity, and the law of contracts, was judicially declared by the Court.

1807.

PURTAB BHAUDUR SING, and another, Appellants,

versus

Mar. 9th.

TILUKDHAREE SING, Respondent.

On a claim by the appellants to a fourth of certain lands, as heirs of their father, it not appearing that the father had any title to the fourth share, the claim dismissed. One of four brothers, who, while living in family partnership with the rest, obtained a considerable grant of land, held to be exclusively entitled to it, by the Hindoo law, it not being shewn that he obtained it by means of aid from any joint funds of the family.

THIS was an action brought by Purtab Bahaudur Sing, and another, in the Zillah Court of Sarun, on the 7th of November 1795, or 11th of *Katic* of the *Fuslee* year 1203, against Tilukdharee Sing, for the proprietary right of a fourth share of certain lands, to the extent of 36,119 beegas, in Tuppa Dho Sahoo, and other adjacent places, held exempt from the payment of revenue; and also to recover the sum of 5,000 rupees, as the produce of the share claimed, during the *Fuslee* years 1201 and 1202; exclusive of mouza Shampoor, forming a part of the share in contest, but in possession of the plaintiffs. The descent of the parties was this;

SUTRAJEET SING,
left four sons,

1st. Raj Sing.	2d. Mahadeo Dutt Sing.	3d. Ubdhoot Sing.	4th. Mahadeo Komar Sing.
		The defendant.	The plaintiffs.

The lands, of which the plaintiffs claimed a fourth share, were stated to have been granted, free from revenue, under the title of *nankar*, by the Nabob Kasim Ali Khan. They were alleged by the plaintiffs to have been conferred on their family, and to have been held by their father Mahadeo Komar Sing, and his three brothers, in family partnership; in consequence of which the plaintiffs claimed a fourth share as the heritage of their father. The defendant denied that the plaintiffs father had any title to a share of the lands, or had ever possessed a share of them; and stated, with respect to mouza Shampoor that the father of the plaintiffs, and the plaintiffs, had held it merely by sufferance. From documents which the defendant produced, viz. 1st, a *sunnud* from the Nabob Kasim Ali Khan; 2nd, a *purwanna* issued by a former collector of the district; it was proved, that, on the 20th of January 1763, prior to the date of the Dewanny, the *nankar* lands in question were conferred on Ubdhoot Sing by Kasim Ali Khan, in reward for public services, and that they were afterwards, on the 15th of December 1792, confirmed to him by Government as his property under the grant; and it appeared to the Zillah Judge that he received and held them as a personal donation. The witnesses for the plaintiffs did not prove that Mahadeo Komar Sing, their father, had ever been in possession of the lands jointly with Ubdhoot Sing; and the Zillah Judge, considering them to be the exclusive property of the defendant, by inheritance from his father, dismissed the claim of the plaintiffs, with costs.

On appeal by the plaintiffs from the above decision to the Provincial Court of Patna, that Court concurred in it, and confirmed it, with costs.

On further appeal by the plaintiffs to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), they rested

their case on the plea, that, at the period when the *nankar* grant was made to Ubdhoot Sing, the father of the respondent, he had not separated from his three brothers (one of whom was the father of the appellants); and that, therefore, all the brothers, or their heirs, were entitled to share in the grant equally with the grantee. A reference was in consequence made by the Court to their pundits, to ascertain, whether, under the circumstances stated, the brothers of the grantee would be entitled to share with him in the grant, and, if so, in what proportions they would share. The pundits, in answer, pronounced the law of the *Shaster* on the case to be as follows; "Of several brothers living together in family partnership, should one acquire property by means of funds common to the whole, the property so acquired belongs jointly to all the brothers. Should, however, the means of acquisition, drawn from the joint funds, be of little consideration, and the personal exertion considerable, two shares belong to the acquirer, and one share to each of the other brothers. But, should property be acquired by one brother without the assistance of any joint funds, it belongs exclusively to the acquirer. Unless, then, it be proved, that Ubdhoot Sing obtained the *nankar* grant by means of the use of property belonging jointly to him and his brothers, the lands are the exclusive property of Ubdhoot Sing and his heirs." Now it was ascertained, that, at the date of the grant, Ubdhoot Sing (the respondent's father), was in possession of a family estate, jointly with his three brothers; and it was not improbable, that the resources of the joint estate might have assisted him in performing the services for which the grant was obtained; but of this there was no proof; and, after the long period (44 years) which had elapsed since the grant, it was not practicable for either of the parties to adduce evidence on the point. As the appellants could not establish the ground, on which alone, under the Hindoo law, they could have a title to share in the grant, their claim was determined to be inadmissible. But in consideration of the doubt whether the *nankar* grant was obtained without aid from the estate held, at the time, jointly by the brothers, it was suggested by the Court, to the respondent, that he should admit the title of the appellants to mouza Shampoore, of which they were in possession; and, the respondent having agreed to this arrangement, it was provided in the decree, by which the claim of the appellants to a fourth share of the *nankar* lands was finally dismissed, that the mouza abovementioned, consisting of 600 beegas, should remain with them and their heirs, as their acknowledged property. The costs of the Sudder Dewanny Adawlut were made payable by the parties respectively. (a)

(a) The Hindoo law, applicable to acquisitions made by one of several brethren living in family partnership, was before stated in the report of Soobhuns Lal, v. Hurbhuns Lal and Rooder Ram, June 17, 1805. In that case, however, the exposition of the law was not so complete, nor so accurately expressed, as in the present instance.

1807.
Purtab
Bahadur
Sing and
others, v.
Tilukdhar
Sing.

1807.

ELDER WIDOW of RAJA CHUTTER SEIN, Appellant,
versus

April 15th. YOUNGER WIDOW of RAJA CHUTTER SEIN, Respondent.

On a claim to a half share of certain endowed lands, as a right by inheritance, adjudged, that endowed lands are not an hereditable property, and that the management of them, alone, for religious uses, can pass by inheritance; and the claimant not appearing entitled to manage the moiety in question, judgment given against her.

THIS was an action brought by the younger widow of Chutter Sein (late zemindar of Burdwan), in the Civil Court of the district, on the 30th of September 1795, against the elder widow, to recover a half share of mouza Rusalutpore, consisting of *dewuttur* lands. The half of their annual produce was stated at 2,699 rupees. They had been assigned, it appeared, as an endowment for religious purposes by Raneé Jykunwur, mother to the husband of the parties, and the produce of them appropriated to the expences of worship in a temple raised at Amboa to Ramsoondur and Lukhinaraen, two Hindoo idols. At the decease of Raneé Jykunwur (since which about 32 years had elapsed), the parties to the present suit, who were her joint heirs, held the endowed lands jointly for a short time. It was soon afterwards agreed to form separate establishments: the plaintiff removed to Burdwan, with the idol Lukhinaraen, and accepted the mouza Chunderhath (a part of the endowed lands, producing 1,400 rupees *per annum*), for defraying its expences; and the defendant remained at Amboa in charge of the remaining lands, the produce of which she appropriated regularly to the charges of the idol Ramsoondur. The plaintiff, in bringing the present action, alleged the endowed lands to have been all along a joint property, and claimed a moiety of those in possession of the defendant, as joint heiress to Raneé Jykunwur. The defendant, after mentioning the plaintiff's having sold mouza Chunderhath (which the plaintiff did not deny) instead of continuing to apply its produce to the purpose for which it was assigned, pleaded, 1st, that she (the defendant), having for so long a time retained the sole superintendence of the idol Ramsoondur, was entitled, by the usage of the family, to the sole management of the lands appropriated to its service, independently of the claim of the plaintiff being barred, by lapse of time, under the rule of limitation; 2nd, that the plaintiff, in misappropriating a part of the endowment, had forfeited all right to share in the remainder. The Zillah Judge having consulted his pundit on the case, and the pundit having given an opinion, that the lands must be considered the joint right of the parties, as heirs of Raneé Jykunwur, that they were properly divisible between them; and that the plaintiff, by the sale of Chunderhath, had not forfeited her right to an equal participation; judgment was given in favour of the plaintiff in the Zillah Court, for the half share which she claimed; but, at the same time, as the mouza Chunderhath, sold by the plaintiff, was considered to have been also joint property, it was ordered that a proportionate compensation, for half of that mouza, should be made by the plaintiff to the defendant, out of the adjudged moiety.

On appeal by the defendant from the above decision to the Calcutta Provincial Court, the Senior Judge who sat in the cause (Ramus) concurred in it; but the other (Wintle) dissented from it, on the ground that the *dewuttur* lands appeared to him not to be hereditably property, or divisible between the parties. The

zillah decree was affirmed by the casting voice of the Senior Judge, and the appeal dismissed with costs. 1807.

On a further appeal by the defendant to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington), this Court, in order to determine the law as connected with the circumstances of the case, proposed the following questions to their pundits; 1st, do lands which have been assigned to an endowment as *de-wuttur*, for religious purposes, constitute an hereditary property? 2nd, if they do not constitute an hereditary property, and the possessor have only the right of management for religious purposes, is the right of management inheritable by the heirs of the person who assigned the lands for such an endowment? 3rd, if the management be hereditary, and the heirs should agree, as in the present instance, to separate the funds, for two distinct religious establishments, is such agreement a legal one? The pundits returned the following answer: "*Dewuttur* lands are not hereditary property: the management of them, alone, for religious purposes, devolves on the heirs of the person who made the endowment. It is lawful for the heirs to separate by mutual consent, and form distinct religious establishments; and, should one of the heirs sell the portion of endowed land under his management, it is not lawful for such heir to claim a share of the portion managed by the other." On considering this opinion of the pundits, and advertng to the following circumstances, namely, that the lands were not hereditary property of either party; that the management of them, since the separation of establishments by mutual consent, had remained, for the long period of thirty-two years, exclusively in the hands of the appellant, and that the respondent, in selling the lands under her charge, had illegally converted to private use what was endowed for purposes of religion; the Sudder Dewanny Adawlut determined that the respondent had no just claim to a share of the lands under the appellant's management, or to participate in the administration of them. The decrees passed by the Zillah and Provincial Courts in favour of the claim were therefore reversed. It was, however, directed, on a consideration of all the circumstances of the case, that the costs in each of the Courts should be paid by the parties respectively. (a)

(a) The question of Hindoo law determined by the *Vyavastha* of the pundits, and the final judgment in this cause, viz. that lands duly endowed for religious purposes are not hereditary as private property, and consequently are not subject to private alienation, is of general importance.

1807.

BRIJ RUTUN DAS (Pauper), Appellant,
versus

April 20th.

BRIJ PAL DAS, Respondent.

Claim by a son on his father, for a balance of cash on account; with an equal amount for interest. The defendant had been once a merchant and banker at Benares. It was stated by the plaintiff, that he and his brothers, after living some years with their father, not finding wherewithal to support themselves, separated, and entered upon different employments; that in the year 1789, the plaintiff went to Cuttack, where he was employed as *gomashita* to the commercial house of Bhuwani Das; that during his residence at Cuttack (a period of about six years) he had transactions on his own account, entirely separate from the defendant, whom he employed as his agent, and to whom he made frequent remittances, the balance of which, remaining in the defendant's hands, and wrongfully withheld by him, was the sum specified in any part of the claim. The defendant alleged, that the plaintiff had never transacted business on his own account, but as a member of the family, and partner with his father; and, moreover, that he, as a father, was master of the acquisitions of his sons, and that no claim on the part of the plaintiff could lie against him. An *aumeen* having been appointed to examine the books of account of the parties respectively, it appeared from his report, confirmed by witnesses for the plaintiff, that the Cuttack transactions were a distinct concern of the plaintiff; and that the defendant had received commission from the plaintiff on account of goods commissioned from Benares. The report gave a balance of 12,957 rupees, due to the plaintiff in account with the defendant; and the City Judge, considering the plaintiff entitled solely and exclusively to the produce of his own separate industry, passed a decree in his favour for the principal and interest claimed, with the usual order with respect to costs, payable by the defendant.

On appeal by the defendant from the above decree, to the Provincial Court of Benares, that Court concurred in it, and confirmed it, with further interest from the date on which it was passed.

On a further appeal to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), this Court amended the foregoing decrees, for the reasons which follow: The Court allowed the respondent's right to 12,957 rupees, in conformity with the *aumeen's* adjustment; but as to the interest claimed, it did not appear to the Court what calculation of it had been made; and the pleader of the respondent, on being questioned, could give no account of it. No interest was specified by the *aumeen* as due, in addition to the sum above stated; and the Court, adverting to the uncertainty whether interest had been usually charged by the parties in their respective accounts, as well as to the relation in which the claimant stood to the other party, determined, that such part of the claim as related to interest, beyond the amount of the

awmeen's adjustment, should not be admitted. Final judgment 1807. was therefore given by the Sadder Dewanny Adawlut for the respondent's recovering 12,957 rupees, with interest thereon from the date of the zillah decree only. It was at the same time ordered, that certain jewels belonging to the appellant, to the value of about 1,500 rupees, which the respondent, when plaintiff in the City Court, admitted to have taken from the appellant; and a dwelling house of the appellant's, also in the respondent's possession; should be sold, and brought into account towards discharging the amount adjudged. The respondent was directed to pay his own costs in each of the Courts: and the order, usual in cases of pauper suitors, was given with respect to the costs of the appellant.

ODITNARAEN SING, Rajah of Benares, Appellant,
versus

1807.

CASINATH, and others, (Heirs of KASHMIRI MULL,) Respondents.

April 24th.

THIS was an action brought by Oditnaraen Sing in the City Court of Benares, on the 5th of April 1803, to recover from the heirs of Kashmiri Mull the sum of 50,000 rupees, as having been embezzled by Kashmiri Mull from the late Raja, Mahipnaraen, the plaintiff's father, in the year 1786. In that year, it appeared, Kashmiri Mull was *khazanchee*, or treasurer, to the late Raja; and Mr. Francis Fowke, a civil servant of the Company, who had for some time held the office of Resident at Benares, left it, to return to England. It was alleged by the plaintiff, that Kashmiri Mull, under pretence of an order from the late Raja to remit 50,000 rupees to Calcutta on account of Mr. Fowke, appropriated that sum, from the Raja's treasury, to his private use; and the plaintiff accordingly sued to recover the amount from the heirs of Kashmiri Mull. The defendants denied the embezzlement imputed to their father, and pleaded, that an order had been given to him by the late Raja for the payment of the sum in question to Mr. Fowke, through Mr. James Grant, who succeeded him as Resident; and that the sum was remitted to Messrs. Cockerell and Co, Mr. Fowke's agents at Calcutta. The defendants further pleaded, that more than 17 years had elapsed since the alleged cause of action arose. The principal evidence brought forward by the plaintiff, in support of his claim, was a *purwanna* dated the 9th of November 1789, by Mr. Duncan, then Resident at Benares, relating to points investigated by order of Government, in consequence of complaints preferred by Raja Mahipnaraen against Mr. James Grant. The third paragraph of it stated as follows; Kashmiri Mull, in his evidence given in the case, has acknowledged that he took 50,000 rupees from the Raja's treasury to remit to Calcutta on account of Mr. Fowke, and alleges Mr. Grant's order for doing it. The Raja should sue Kashmiri Mull before the Resident for the recovery of it." The documents adduced by the defendants were, 1st, A *hoondee*, or bill of exchange, dated the 23rd of Fe-

1807. **Ordinances Sing, v. Cadinath and others.** January 1786, drawn by the house of Kashmiri Mull at Benares, on Calcutta, payable to Messrs. Cockerell and Co. on account of Mr. Fowke, and endorsed with a receipt, by a partner of that house; 2nd, two letters from the late Raja to Kashmiri Mull, (dated, one the 21st of November 1785, and the other the 2nd of February 1786), reciting, in the first, that he had approved the payment of a *nuzr*, to Mr. Fowke, of a lack of rupees, on account of the *Fuslee* year 1193 (the commencement of it corresponding with September 1785); and, in the second, reciting the payment of 50,000 rupees, in part, and authorizing the payment of the remaining 50,000; 3rd, A *farigh khuliy*, or receipt in full on adjustment of accounts, from the late Raja to Kashmiri Mull's eldest son She-deen', who appeared to have been in the habit of acting for him, as treasurer, dated the 27th of September 1788. These documents were denied by the plaintiff to be genuine; and the Judge of the City Court, on examining the seals of them, and finding that they differed from each other, suspected the documents to be forgeries, and refused to admit them in evidence. From the passage quoted from Mr. Duncan's *purwanna*, he concluded, that the remittance had been made without directions from the Raja, and that the estate of Kashmiri Mull was answerable for it. With respect to the length of time which had elapsed since the cause of action, the Judge observed, that, at the death of the late Raja, the plaintiff was a minor, and that the deduction of the years of his minority would bring the cause within the period prescribed for the cognizance of actions; so that there was nothing, on that ground, against the admission of the claim. Judgment was accordingly given in the City Court in favour of the plaintiff, for the sum demanded, with costs against the defendants.

On appeal by the defendants from the above decision to the Provincial Court of Benares, that Court did not concur in it. From several authenticated papers produced by the heirs of the treasurer before the Provincial Court, it was proved, that the late Raja was in the habit of using four seals, each slightly differing from the other; and it appeared to the Provincial Court, as well as to their law officers, who were consulted on the occasion, that the impressions on all the documents adduced by the heirs of the treasurer before the City Judge, corresponded with one or other of those seals. The Provincial Court considered that the documents were genuine, and that the letters of the Raja proved his having authorized the remittance of the sum in question by the late treasurer, for the purpose stated by the heirs. With respect to the passage in the *purwanna* of Mr. Duncan, the Resident at Benares, which seemed to have had material weight with the City Judge, the Provincial Court observed, that it could not be taken as the ground of a decision against the late treasurer, as it mentioned no proof of the embezzlement imputed to him, but, on suspicion of it merely recommended that an action should be brought against him. The late Raja, it appeared, did not die till six years after the date of the above *purwanna*, and, notwithstanding the intimation given in it, took no measures for suing the treasurer for the amount in question; and the Provincial Court observed, that the fair inference to be drawn from the Raja's silence, considered with

the authenticity of the letters under his seal, as in their opinion established, was that the embezzlement imputed to the treasurer, and the present claim preferred against his heirs, had no real foundation. The decree passed in favour of the claimant, by the City Judge, was accordingly reversed by the Provincial Court; with costs against the claimant.

On appeal by the claimant from the above decision to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), this Court concurred in it, and finally determined that no responsibility could attach to Kashmiri Mull, or his heirs the present respondents, although an action for the recovery of the money, as having been illegally and corruptly received, might lie against Mr. Fowke, or his representative. Judgment was accordingly passed by the Sudder Dewanny Adawlut, confirming the decree passed against the claimant by the Provincial Court, and dismissing the appeal with costs.

MUHRONNISA KHANUM, Appellant,

1807.

versus

MUSSUMMAUT BUDAMOON, and others, (Heirs of LUJA RAM,) Respondents.

May 25th.

THIS was an action brought by Muhronnisa in the Zillah Court Claim by of Behar, on the 21st of January 1801, or 11th *Maugh* of the *Fuslee* year 1207, against the heirs of Luja Ram, to redeem certain mortgaged lands, and to recover the sum of 6,274 rupees as balance realized from the usufruct by the mortgagee and his heirs, in excess of the principal and interest of the debt, for which the mortgage was granted. It was set forth in the plaint, that the lands of mouza Doolubhpoor, Chuk Raseen, and Chuk Buroo-na, which had been held exempt from revenue, the former as *altumgha*, and the two latter as *ayma*, by Gholam Ruza Khan, the plaintiff's husband, were mortgaged by him, on the 6th of February 1774, to the late Luja Ram, for the sum of 6,701 rupees; being that after considerable sums had been realized from the mortgagee, the *ayma* lands were given up, and the *altumgha* retained; that the plaintiff on the decease of her husband, applied to the mortgagee for a statement of his receipts, and obtained from him a written voucher under date the 27th of February 1787, acknowledging the receipts at that time to be 13,376 rupees, and engaging to deliver up the lands, on a settlement of accounts; that, however, a settlement had been evaded; that, at the date of the action, the mortgage had been cleared; that, calculating on one side the principal of the debt and an equal sum as interest, and on the other, the receipts up to 1787, and from that time to the date of the action, there was a balance of the sum specified in the claim, due to the mortgagor. The defendant Mussummaut Budamoon (the only one who appeared) denied that there was any ground to maintain the suit, and alleged that, of the lands specified in the mortgage deed, Chuk Raseen had not been given into possession of the mortgagee; that Chuk

1807. Buroona had been found to have been previously mortgaged to another person, and was delivered up to him; and that mouza Doolubhpore, the only lands which the mortgagee had held, did not yield profits equal to 12 *per cent* annual interest on the debt; that the voucher for receipts, stated by the plaintiff, was a fabrication; that the mortgagor, knowing that the mortgage could not be cleared by the usufruct of the lands, which the mortgagee held, had forbore till now to claim the redemption; that, after deducting a partial payment, there remained 6,377 rupees balance of principal still due, according to a bond from Moohummud Julal, son of the mortgagor, dated in the *Fuslee* year 1193: until payment of which balance of principal the lands of mouza Doolubhpore were not redeemable. The Zillah Judge being of opinion that the claim was not cognizable, under the rule of limitation, in consequence of the plaintiff not having claimed the redemption of the mortgage for 12 years, judgment was given against the plaintiff in the Zillah Court, with costs. It is to be remarked, however, that there was a dispute respecting the right to hold the mortgaged lands of mouza Doolubhpore, between the widow of the mortgagee, and the banking house of Goolab Rai at Patna, into whose hands the lands had been assigned by the mortgagee, and who alleged the assignment to have been made in discharge of a debt; and it appeared that Sheopurshad, the *gomashda* of that house, (who was in consequence made a defendant in the cause, in the Zillah Court) had, during the suit, made a compromise with the plaintiff, and delivered the lands into her possession. This transfer, as being probably against the right of the other defendants, was declared of no effect by the Zillah Judge; but it was thought proper to allow the lands to remain with the plaintiff, until it should be determined which of the other parties was entitled to them.

On appeal by the plaintiff (the widow of the mortgagor) from the decree passed against her by the Zillah Judge, to the Provincial Court of Patna, that Court also dismissed the claim, though on different grounds. It was proved to the Provincial Court, as stated on the part of the heirs of the mortgagee, that of the lands mortgaged to Luja Ram, part had been sold, and part previously mortgaged, by the mortgagor, and that mouza Doolubhpore, alone, had remained in the hands of the mortgagee, or his heirs, the produce of which (525 rupees *per annum*) was not equal to legal interest on the amount of the mortgage debt, so that it was not possible for the mortgage to have been cleared by the usufruct. And with respect to the alleged voucher for receipts, to which the Court attached no credit, and between the date of which and the commencement of the present action more than 12 years had elapsed, without its having been made the ground of any claim, the Court considered that the rule of limitation was sufficient to render it of no effect. On these grounds, therefore, the Provincial Court dismissed the appeal, with costs. And it was at the same time ordered, that mouza Doolubhpore should be delivered up to Mussumaut Budamoon, on the part of the heirs of the mortgagee, the Court not considering that Sheopurshad was authorized to make it over to the other party.

A further appeal was brought by the widow of the mortgagor to the Sudder Dewanny Adawlut (present J. H. Harrington and J. Fombelle). On investigation of the case, it was observed by the Sudder Dewanny Adawlut, that by the mortgage deed, bearing date the 6th of February 1774, it was stipulated, that the usufruct of the lands specified in it should be in lieu of interest to the mortgagee, until the redemption of the mortgage, viz. by payment of the principal lent; and that, under regulation 15, 1793, supposing the whole of the specified lands to have been delivered to and held by the mortgagee, and the usufruct to have exceeded legal interest on the debt, such usufruct would have been receivable, as interest, down to March 1780, after which, legal interest alone would have been allowed to the mortgagee, the surplus being made applicable to the discharge of the principal. It was clear, however, and indeed was acknowledged by the appellant, that no part of the lands specified in the original mortgage deed had been held by the mortgagee, or his heirs, excepting mouza Doolubhpore, producing annually an amount not equal to legal interest on the debt; so that of course the mortgage, as observed by the Provincial Court, could not have been cleared from the usufruct: though, at the same time, according to the contents of a bond from Moohummud Julal, son of the mortgagor, filed on the part of the respondents, there was an admission on their part; that the mortgagee, in 1785, consented to confirm the former agreement for the receipt of usufruct in lieu of interest. The Sudder Dewanny Adawlut agreed with the Provincial Court in considering the rule of limitation a bar to the admission of any demand under the alleged voucher for receipts, produced by the appellant; but the Court held, (as provided by the 4th clause of section 3, regulation 2, 1805, enacted since the decrees of the Zillah and Provincial Courts were passed) that the rule of limitation could not affect the claim to redeeming the lands of Doolubhpore, inasmuch as Luja Ram and his successors, having held the lands only as tenants in mortgage, did not hold them under a title capable of forming a right of property by prescription. It was accordingly pronounced, that the appellant, or (as it appeared that there were other heirs, who disputed her exclusive right,) whoever should be the legal successor to the estate of Gholam Ruza Khan in the mortgaged lands of Doolubhpore, would be entitled at any time to redeem the mortgage, on paying off the principal due. Final judgment was accordingly given by the Sudder Dewanny Adawlut, dismissing the appellant's claim to the redemption of the mortgage, until the principal due should be paid off; with costs against the appellant. Whether the right of holding possession of mouza Doolubhpore while the mortgage should remain unredeemed, was vested in the respondent, Mussummaut Budamoon, on the part of the heirs of the mortgagee, or in the house of Goolab Rai, under an assignment from the mortgagee, no opinion was given by the Sudder Dewanny Adawlut, as it was not connected with the question in appeal; but as possession had been ordered to be given to the respondent under the decree of the Provincial Court, it was directed that that order, if objected to by the house of Goolab Rai, who had possession before this suit was instituted, should not be enforced.

1807.

Mohron-
bisa Kha-
num, v.
Mussum-
maut Bu-
damoon,
and others.

1807.

MEHUNT RAMPERSHAUD, Appellant,

versus

June 5th.

MEHUNT ODAUNGIR, Respondent.

Claim on a talookdar, to recover possession of certain lands, as having been granted to the claimant's ancestor, exempt from revenue, under the designation of *shewuttur*. Lands adjudged, on proof of grants made before the dewanny; with the exception of 15 beegas, the grant for which was subsequent to the dewanny, and not sanctioned by government. A compromise, entered into between the parties while the suit was depending set aside, in consequence of one of them not having performed the conditions of it.

THIS was an action brought by Odaungir, in the Zillah Court of Tirhoot, on the 18th of November 1794, or 11th of *Aghun* of the *Fuslee* year 1202, to recover from Rampershaud 380 beegas of *lakhiraj* land, together with the sum of 1,209 rupees, the amount of profits appropriated by the defendant. These lands were situated in Tajpoor, and other mouzas, the talookdaree right of which had been purchased by the *gooroo*, or spiritual teacher of the defendant, and from him had devolved on the defendant. It was stated in the plaint, that the lands claimed had been held exempt from revenue for a series of years, under the designation of *shewuttur*, or lands appropriated to the service of the idol *Sheo*, by Bulundgir, an ancestor of the plaintiff, and by Munohirgir, the plaintiff's immediate predecessor, under regular grants from former proprietors of the defendant's estate; until, in the *Fuslee* year 1194, Munohirgir was wrongfully dispossessed by the defendant's predecessor; and the plaintiff, in consequence, now sued for the recovery. The defendant, in his answer, pleaded, 1st, that the lands, though once *lakhiraj*, had been resumed, as illegally alienated, and included in his estate; 2nd, that a *bazneenama* or deed relinquishing the present demand, had been executed by the plaintiff since the suit was filed. The plaintiff denied this instrument to be a bar to his claim, stating that he executed it in contemplation of a compromise, by which it was agreed, that he should relinquish his claim on the defendant, and not demand any of the produce of the lands, on condition of the lands being given up to him; which had not been done. The Zillah Judge, however, as the instrument (dated the 25th of August 1795), plainly stated, that the plaintiff relinquished the present demand, considered it to bar the action under all circumstances, and gave judgement accordingly against the plaintiff, with costs, in a decree bearing date the 21st of November 1803.

On appeal by the plaintiff from the above decision to the Provincial Court of Patna, that Court did not concur in it, for the following reasons: Witnesses on the part of the claimant, proved to the satisfaction of the Court, that the instrument, relinquishing the claim, was, as stated by the claimant, founded upon an intention to compromise the dispute, by resigning the intermediate profits of the lands, on condition of the lands being delivered into his possession; and, although this condition was not distinctly specified in the instrument, it was fairly inferrible that some such condition must have been made; and there was no probable motive for the claimant's relinquishing his demand *in toto*. From five *sunnuds* produced by the claimant, regularly registered in the collector's office, and each for a separate portion of land, making in the whole the quantity claimed, it was proved that the lands had been granted as *shewuttur* to the claimant's ancestor, by former zemindars of the estate; and as only two of the grants, viz. one for 9, and another for 15 beegas, were for a quantity less than 100 beegas, the Court observed, that, under section 7, regulation 19,

1793, even supposing them resumable, government, and not the zemindar, was entitled to the revenue assessable on the lands. As the Provincial Court was of opinion, that the lands legally appertained to the claimant on a free tenure, under the grants produced; as well as that the instrument of relinquishment, proposed by the other party, was executed under a condition of the lands being delivered to the claimant, which condition not having been fulfilled, the claimant was not bound to resign his claim to the profits, the Provincial Court pronounced him entitled to possession of the lands, and to the intermediate profits which he demanded. The decree of the Zillah Court being reversed, judgment was passed in his favour accordingly, with costs in both Courts against Rampershaud, the original defendant.

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Mehunt
Rampershaud, v.
Mehunt
Odaungir.

On appeal by Rampershaud from the above decision to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), this Court concurred with the Court of Appeal, as to the deed of relinquishment being ineffectual; and as to the fact of *sunnu*s, granting the lands in contest exempt from revenue, having been obtained by the respondent, or his ancestor. It was ascertained, from some former proceedings, that the appellant's predecessor, on purchasing the talook containing these lands, in the *Fuslee* year 1179, found the respondent's predecessor in possession of them; and that the respondent's predecessor, in consequence of being frequently molested by the purchaser, took in farm the villages containing the exempted lands, and continued to hold the lease of them until 1194, at which time the lessor discontinued the lease, and also dispossessed the respondent of the exempted lands, on the pretence of their having been resumed, and annexed to his estate. The Sudder Dewanny Adawlut observed, therefore, that the present had been evidently a case of ejectment on the part of the appellant. Of the *sunnu*s, however, under which the lands were exempted from assessment, one for 15 beegas, dated in the *Fuslee* year 1175, corresponding with 1769, being subsequent to the dewanny, and not having been granted with the sanction of Government, the Court observed, that, under this *sunnu*, these 15 beegas were not the *lakhiraj* tenure of the respondent, but were liable for revenue; to which revenue the appellant (though he ought to have regularly sued for it) was the person entitled, under section 6, regulation 19, 1793. With the exception of these 15 beegas, of which possession was not adjudged to the respondent, the decree passed in his favour by the Provincial Court, including the mesne profits of the remaining lands, was confirmed by the Sudder Dewanny Adawlut. The costs were made payable by the appellant.

1807.

IMAUM BUKSH KHAN, Appellant,
versus

June 22nd.

NAWAB DILAWUR JUNG, Respondent.

Claim by the appellant to certain lands in the possession of the respondent, as the claimant's hereditary property. On proof to the satisfaction of the Sudder Dewanny Adawlut, showing the title of the claimant's father, and of the claimant as heir, the lands adjudged, with mesne profits from a certain date.

THIS was an action brought by Imaum Buksh Khan in the Zillah Court of Behar, on the 2nd of April 1799, or 22nd of *Cheit* of the *Fuslee* year 1206, to recover from the Nawab Dilawur Jung, the villages Bureeana, &c. fourteen in number, situated in pergunna Kabur, together with 4,000 rupees, mesne profits. The annual produce of the villages claimed was stated at 3,153 rupees. It was set forth in the plaint, that these villages were the plaintiff's *milkeut* or property, as heir of his father, who was *malik* or proprietor of them at his decease in 1177: that, the plaintiff being then an infant, the villages remained under the management of the Nawab Mozuffir Jung, who held the pergunna in *jagir*, until, in 1191, the plaintiff's minority having expired, he applied to Buhram Jung, younger son of Mozuffir Jung, who had been appointed *mokhtar* or superintendent of the *jagir*, for possession of his lands, and for the *malikana*, or proprietary profits, of past years: that Buhram Jung evaded the demand; and the plaintiff, in 1194, applied personally to the Nawab Mozuffir Jung, by whose directions Buhram Jung made a reference, respecting the title of the plaintiff, to Yakoot Khan, *naib* or manager of the *jagir*, who in reply transmitted a report from the *canoongoes* of the pergunnah, affirming the right of the plaintiff: that Buhram Jung, accordingly, ordered Yakoot Khan to give the plaintiff possession, and pay him the arrears of annual profits; which Yakoot Khan evaded: that the plaintiff brought an action against him in 1199, but was nonsuited, and directed to sue the Nawab himself, or his heirs. The plaintiff accordingly brought the present action for possession of the villages, and for profits (to the amount specified in the claim), which had accrued from 1177 to the end of 1205. The defendant, in his answer, 1st, denied the claim *in toto*, as well as all knowledge of the circumstances stated by the plaintiff; 2ndly, pleaded, that, according to the plaintiff's statement, the cause of action arose in 1177, since which 30 years had elapsed, and that the cognizance of the claim was barred under the rule of limitation. The chief documents adduced by the plaintiff, to prove the title of his father, and the circumstances stated in his plaint, were, 1st, *umuldustuc*, or order for possession, from Rai Gopal Sing, *sudr naib* of the *jagir*, under date the 10th of December 1766, (1174 *Fuslee*), reciting, that, Moohummud Bahaudur, (father of the plaintiff) zemindar of 24 mouzas in pergunnah Kabur, including those in question, had made a settlement for his lands; and directing that possession should be given him; 2nd, letter from the same person, dated in 1175 *Fuslee*, addressed to the *tehsildar* of the *jagir*, and informing him, that, in consequence of the approved conduct of Moohummud Bahaudur, talookdar of Domru, &c. a *nankar* or annual grant of 500 rupees, to commence from the beginning of the year, had been settled on him by the *jagirdar*, and was to be deducted from the rent of the talook; 3rd, attested copy of a report from the *canoongoes* of Kabur, delivered to

the manager Yakoot Khan, on the 2nd of January 1788, (1195 *Fus-lee*) declaring the right of the plaintiff, and reciting, that according to their records, Moohummud Bahaudur, in 1174, entered into engagements for his lands, and held them himself till the end of 1175; that, in 1176, on his refusing a demand of increase of revenue, they were made *seer*, or taken into the hands of the *jagirdar*, and a *malikana* settled on the proprietor in lieu; 4th, attested copy of a *purwanna* from the Nawab Buhram Jung to Yakoot Khan, under date the 13th of September 1788, acknowledging the right of the plaintiff, as ascertained from vouchers, and from the *canoongoe's* report; and directing possession to be given to him, as heir of his father. Several witnesses were adduced by the plaintiff in support of these documents, and of the facts particularized in the plaint, and the Zillah Judge considered it to be proved, that the plaintiff's father was proprietor of the villages in question at his decease; that the plaintiff was the regular heir to them: and that his title, as such, had been expressly admitted by the ancestor of the defendant. With respect to the plea of lapse of time urged by the defendant against the cognizance of the claim, it was observed, that the plaintiff, at the decease of his father in 1177, was ascertained to have been an infant; that he was not of age (18) before 1190; and that, as appeared from a copy of a former decree of the Court in the cause of the plaintiff against Yakoot Khan, manager of the *jagir*, he sued that person to establish his title, in 1199, within nine years after the period of his minority expired; that therefore, the limitation of 12 years, prescribed for the cognizance of actions, was not applicable to the present case. Judgment was accordingly passed in the Zillah Court in favour of the plaintiff, for the lands, and the mesne profits demanded; with costs against the defendant.

Dilawur Jung, on preferring an appeal from this decision to the Provincial Court of Patna, alleged, that his father purchased, in 1197, the villages in question from Kuhwun Sing, and others, whom he could prove to have been the proprietors, though the deeds of sale had not come into his possession. The Provincial Court reversed the zillah decree, on the following grounds: From a *sunnud* of the Patna Council, under date the 6th *Bhadon* 1179, or 20th of August 1772, (one of the documents filed in the former suit brought by the claimant against Yakoot Khan), it appeared, that a claim had been preferred before that Council by Miterjeet Sing and another, against Kuhwun Sing and others, respecting the proprietary right of pergunna Kabur, and that a decision, passed on the above date, adjudged it to be the right of the latter persons, the same from whom Dilawur Jung stated the purchase of the villages in question to have been made by his father. It also appeared, that in 1778, a report was drawn up, in pursuance of an order from the Patna Council, specifying the proprietors of the villages in pergunna Kabur, in which report, now produced by Dilawur Jung before the Provincial Court, the fourteen villages in question were not in the name of the claimant or his ancestor. Under these circumstances, it appeared to the Provincial Court, that the *umuldustuc* from Rai Gopal Sing, the chief document on which the claimant relied, (containing an avowal of his title to

1807.

Imaum
Bukah
Khan, r.
Nawab
Dilawur
Jung.

1807. the villages in question as the result of an enquiry instituted by order of the *jagirdar*), was not entitled to that degree of authority attributed to it by the Zillah Judge, and, at all events, as it was only the act of a servant of the *jagirdar*, that it was not conclusive as to the *jagirdar's* having admitted the proprietary right of the claimant. Under these circumstances, joined with the length of time during which Dilawur Jung and his predecessors had held the villages, the Provincial Court did not consider the proofs adduced by the claimant sufficient to authorize a judgment against the possessor. The decree passed in favour of the claim, by the Zillah Judge, was therefore reversed by the Provincial Court, with costs against the claimant.

Imam
Buksh
Khan, v.
Nawab
Dilawur
Jung.

On appeal by the claimant from the above decision to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), this Court, on mature consideration of the documents and evidence brought forward in the case, did not concur in it. The *umuldustuc* from Raigopal Sing, *naib* to the *mokhtar* of Mozuffir Jung's *jagir*, and the latter from the same person to the *tehsildar* of the *jagir*, informing him, that a *nankar* of 500 rupees *per annum*, fixed for the claimant's father by the *jagirdar*, was to be deducted from the rent of his lands, were both, and more expressly the former, declaratory of his right as proprietor, and were admitted by the pleader of the respondent; and the Court were of opinion that the former document, as the official act of a public servant of the *jagirdar*, could be considered in no other light than as conveying the *jagirdar's* avowal of the title of the appellant's father to the villages in question. The attested copy of the *canongoe's* report exactly corresponded (as far down as it reached) with another document produced by the appellant, viz. a statement of the proprietors in pergunna Kabur, between the years 1110 and 1199, delivered, with other papers, into the collector's office, by the *canongoes* of the pergunna, after the resumption of the *jagir* in 1200, on the decease of the late Nawab. This paper, which stated the 14 mouzas in question as the hereditary property of Bahaudur Khan, specified, that they were managed by him personally in 1174 and 1175; that in 1176, from his not consenting to an increase of revenue, they were taken by the *jagirdar* into his own hands, and an allowance in lieu fixed for the proprietor. The witnesses on the part of the appellant, twelve in number, and the greater part of them late *canongoes* in the pergunna, corroborated in every point the documents and statements of the appellant, and proved, that, at the death of his father, the appellant was not five years of age; that, when his minority expired, he applied for possession of the villages; that an investigation was made, and his title avowed, in the manner and under the circumstances stated. The Court of Sudder Dewanny Adawlut had no doubt of the title of the appellant; and were of opinion, that the plea of lapse of time, urged by the respondent against the cognizance of the claim, could not, for the reasons stated by the Zillah Judge, be admitted in the case. In the Provincial Court, the respondent had alleged the lands to have been purchased by his father, from Kuhwun Sing and others, stated to have been the former proprietors; but of this purchase no proof was offered. With respect to the *sunnud* of

the Patna Council, dated in August 1772, and the report of the proprietors in Kabur, dated in 1778, on which documents the Provincial Court chiefly grounded their decision against the claimant, the Court observed, that, in the cause before the Patna Council, the claimant was not a party; and that, although his name, or that of his father, was not inserted in the report of 1778, as proprietor of the villages in question, yet these villages were in that report set apart from the rest, under a separate head; and the appellant's name not appearing, might be accounted for by his having been a minor at the time, and not present on the spot; and, at any rate, this circumstance did not appear to the Court sufficient to disprove the appellant's title, in opposition to the evidence brought in support of it. On these grounds, the Sudder Dewanny Adawlut approved and affirmed the decision passed by the Zillah Judge in favour of the appellant's right to recover the villages. The respondent admitted having had possession of the villages, and paid the revenue, as reputed proprietor, from the beginning of the year 1200, when the *jagir* was resumed; and the appellant had brought his action against the *naib* of the *jagirdar* in 1199. It was therefore determined, that an account should be rendered, by the respondent to the appellant, of the mesne profits from the beginning of 1200 to the end of 1214 (the current year), which, computed at the rate of 10 per cent on the annual produce of the villages, amounted to 4,725 rupees. This sum, with possession of the villages, was accordingly adjudged to the appellant by the Sudder Dewanny Adawlut; with costs in each of the Courts against the respondent.

GOPAL DAS, Appellant,

versus

SHUNKER POOREE, and others, Respondents.

1807.

June 29th.

THIS was an action brought by Shunkur Pooree, and others, in the City Court of Benares, on the 5th of September 1803, against Gopal Das, and Balkishen Das (his brother), to recover the sum of 11,533 rupees, balance (including interest) due to the plaintiffs. The defendants had been proprietors of a banking house at Benares, which, about the beginning of September 1801, failed for a considerable amount. Shortly before the failure, the plaintiffs had paid cash into the house for bills which they required, at Moorshedabad, at which place these bills were protested, and payment of them refused. The plaintiffs in consequence came upon the house, for payment; and it was agreed, that they should take a *teep*, or promissory note for the amount, with a mortgage on two houses at Benares, as security for the payment within six months. This term having expired, the plaintiffs claimed payment from the defendants, or in default of it, required the mortgaged house to be sold to make good the money. The defendant Gopal Das denied all knowledge of the bills, and of the mortgage, in short all concern in the transaction; and alleged that he had relinquished his interest in the banking house six months before

1807. the failure. To prove this, he adduced a *farigh-khutty*, or deed of release, from his brother Balkishen, under date the 3rd of March 1801, reciting, that the partnership between them was dissolved, and that Balkishen had taken on himself the sole interest and responsibility in the house. Balkishen (the other defendant in the cause) admitted the mortgage, as from himself, but pleaded that payments nearly equal to the sum now demanded had been made at Moorshedabad. Of this, however, no proof was adduced; and the City Judge observed, that it was extremely improbable; as the mortgage deed was executed after the return of the protested bills from Moorshedabad; and, if any payments had been afterwards made, receipts would have been forthcoming. The *farigh-khutty*, adduced in proof of the alleged dissolution of partnership between the defendants, had been produced in the City Court on a former occasion, when strong doubts were entertained of its fairness; and the circumstances of the present case confirmed the suspicions against it. The bills on Moorshedabad, as produced in Court, dated after the execution of the alleged *farigh-khutty*, were drawn in the names of both the brothers, which was considered a strong proof that the partnership was not actually dissolved; and accordingly the mortgage deed, though only signed by Balkishen, being the immediate result of a transaction which appeared to have been common to both the defendants, was presumed by the Zillah Judge to have been signed by one on the part of the firm, and to be binding on both of them. But it being found that the two dwelling houses specified in the mortgage deed, had been before mortgaged for a different debt to two persons, who proved the previous mortgage, and protested against the sale of the houses in satisfaction of the present demand, the City Judge admitted that the second mortgage, to the plaintiffs, could not preclude the right of the prior mortgagees, and that the sum due to the plaintiffs from the defendants must be recovered from any other property of the defendants, which might be forthcoming. Judgment was given accordingly in the City Court, with costs against the defendants.

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Balkishen did not appeal from this decision; but the other defendant, Gopal Das, still asserting the dissolution of partnership, appealed to the Provincial Court of the division. That Court however concurred in the decree of the City Judge, for the following reasons: The appellant, it was observed, though the bills were drawn in the names of both the brothers, denied any knowledge of them; but as it appeared in evidence that the brothers Balkishen and Gopal Das were not separated, but were living under the same roof at the period when the bills, drawn in their joint names, were granted, it appeared to the Provincial Court to be fairly inferrible, that the appellant could not have been unaware of the transaction. And as the banking house failed for nearly five lacs of rupees, and the deed, purporting to dissolve the partnership, was dated only six months before the failure, the Court considered it presumable that the deed was collusively executed, in contemplation of bankruptcy, with a view to withhold the property of the parties from satisfying, as far as it would go, the debts of the house. The alleged dissolution of partnership, therefore, was declared inad-

missible; and the judgment of the City Court was affirmed, with 1807.
costs against the appellant, and interest on the sum adjudged.

The Sudder Dewanny Adawlut (present H. Colebrooke and Gopal Das, J Fombelle), on a further appeal to it, concurred in the above v. Shanker Poorce, and decrees, and confirmed them, with costs against the appellant (a) others.

PITUMBER BHURTACHARIJ, Appellant,

1807.

versus

RAMJEE BUNOJAH, (through KONLA KAUNT DUTT,) Respondent.

July 3d.

ON the 14th of June 1797, the zemindaree right of pergunna Claim by Saedpore was sold at auction by the sheriff of Calcutta, in satisfaction of a judgment of the Supreme Court against Srikunth Rai, the former proprietor, and was purchased by Ramjee Bunojah, respondent. It was stated by Pitumber Bhurtacharij, that he was, at the time, in possession of mouza Ruheeta, the subject of the present suit, as his talook, situated in the pergunna; and that Ramjee Bunojah, notwithstanding, wrongfully dispossessed him, by force. This action therefore was brought by Pitumber Bhurtacharij, in the Zillah Court of Jessore, on the 29th of December 1797, to recover possession under regulation 49, 1793, which provides for summary redress in cases of forcible ejectment. The defendant affirmed that he had been regularly put into possession of the mouza in question, as purchaser of the pergunna. This, however, did not appear, there being proof that the plaintiff, as stated by him, had been irregularly and forcibly dispossessed, though he, at the time, asserted a right to the lands as his talook. But as it appeared that the plaintiff rested his title to the mouza on a talookdary pottah from Srikunth Rai, the late zemindar, granting him a lease in perpetuity, at an annual rent of 257 rupees, whereas it is declared by section 2, regulation 44, 1793, that no lease shall be granted by a zemindar, fixing the rent of a dependant talook for a longer term than ten years, the Zillah Judge being of opinion that this pottah was of no effect, and that the plaintiff had no title to possession, decreed that the mouza should remain in possession of the defendant; but that the defendant, in consideration of the forcible ejectment being proved against him, should pay the costs.

On appeal by the plaintiff from the above decision to the Provincial Court of Calcutta, it was observed by that Court, that the Zillah Judge ought to have conformed strictly to the regulation respecting forcible dispossession, which directs, that, on the fact of forcible ejectment being proved, the party dispossessed is to be reinstated, without enquiry into his title; instead of which, the zillah decree was in fact founded on the question of right. But, as the case stood before the Provincial Court, they considered them-

(a) The alleged dissolution of the partnership, by a deed privately executed, could be allowed no weight in opposition to the continuance of the appellant's name in the transactions of the house. The circumstance of the *hoondees*, which were the foundation of the action, having been drawn in the names of both the brothers and partners, was in this case decisive.

1807.

against the
zemindar,
by whom
the talook
was sold,
and his
heirs.

A *pottah*
for the sale
of a talook
at a fixed
rent in per-
petuity,
invalid,
(under
section 2,
regulation
44, 1793)
with res-
pect to the
fixed rent;
but valid
for the sale.

selves authorized to decide the appeal on either ground; and, with a view to the interest of both parties in saving further expense, preferred taking the question of right. As the Court concurred with the Zillah Judge in considering the claimant's *pottah* invalid, and that he had no title under it to the mouza Ruheeta as his talook, the judgment passed in the Zillah Court against the claimant, was confirmed; with costs, however, payable by the defendant, in consideration of the forcible dispossession.

The value of the property in contest being below the limitation of regular appeals to the Sudder Dewanny Adawlut (present J. H. Harrington and J. Fombelle), the Court from the circumstance of the decisions of the Courts below not having been conformable to regulation 49, 1793, under which the original action was brought, admitted a special appeal on the part of the claimant. And when the cause came on to be tried, a motion being made by the pleaders of both parties for a decision on the question of right, and not of possession, the Court, observing that the cause had been a long time depending, consented to decide on the right to the talook, on the ground of its being the declared wish of both parties, observing at the same time, that, otherwise, the proceeding would not be regular. On examining the merits of the cause, the Sudder Dewanny Adawlut overruled the opinions of the Zillah and Provincial Courts, with respect to the *pottah*, on which the appellant grounded his title, being rendered altogether ineffectual by the 2nd section of regulation 44, 1793, and held, that under that regulation, it was only invalid in so far as related to a fixed rent in perpetuity, but that it was valid for the sale of the talookdary right of the mouza in contest by the late zemindar to the appellant. On the other hand, as it was proved from the books of the Sheriff of Calcutta, that, at the time when the *pottah* in question was granted to the appellant, the pergunna was under attachment by the Supreme Court, which attachment ended in the sale of it to the respondent, so that, at that time, the zemindar could have had no legal power to grant a talookdary tenure of any of the lands, it was pronounced that, on this ground, the *pottah* was of no effect against the right of the respondent, under his purchase of the pergunna. Judgment was accordingly given by the Sudder Dewanny Adawlut, confirming the decrees passed against the claim of the appellant by the Zillah and Provincial Courts; with costs (on the ground before stated) payable by the respondent. It having however been reported to the Sudder Dewanny Adawlut, that a suit was depending in the Supreme Court between the heirs of the late zemindar of pergunna Saedpore, and the respondent, on a claim by the former to set aside the sheriff's sale of the pergunna, it was signified to the appellant by the Sudder Dewanny Adawlut, that, in the event of this sale being set aside, and of the pergunna being recovered by the zemindar's heirs, the present decision would be no bar to the appellant's claim on the heirs, for the talookdary right of mouza Ruheeta, under the sale which appeared to have been made to him of that tenure, by the late zemindar. (a)

(a) The principles which guided the final decision in this case, have been already fully noticed in the note of Munroop Rai, v. Ramjee Bunoja and Bnai-kaut Rai, Dec. 22, 1806, relative to another talook situated in pergunna

JANKI DIBEH, (WIDOW OF RAJKISHOR RAI), Appellant,

1807.

versus

SUDA SHEO RAI and BHUWANIPERSHAD RAI,

July 17th.

Respondents.

THE late Rajkishor Rai and his brothers Suda Sheo and Bhu- On the suit wanipershad, had jointly inherited from their father a $7\frac{1}{2}$ ana of two persons a- share of pergunna Koondee, so that, on a partition of the estate, gainst the each would be entitled to $2\frac{1}{2}$ anas. Rajkishor, who was the eldest widow of of the brothers, and had no issue, was stated by the two younger their brother- brothers, to have executed a testamentary deed in their favour, to set the day before he died, reciting, that he had not adopted a son; adoption that he had not authorized his wife to adopt one after his death, made by the nor would authorize her to do so; and providing, that his $2\frac{1}{2}$ ana widow, as share of the pergunna should remain in possession of his widow illegally during her life, and devolve to the younger brothers at her decease. depriving them of the After the death of Rajkishor, however, the widow produced a reversion deed, which she alleged to have been executed by her husband, of part of a giving her authority to adopt a son; and she had accordingly jointestate, adopted one, with the usual ceremonies, to succeed to the $2\frac{1}{2}$ ana which, under a testa- share of Rajkishor, her late husband. This action, therefore, was mentary brought by the younger brothers, in the Zillah Court of Rungpore, deed executed (on the 1st of November 1802), to set aside the adoption made by their brother, was the widow, and to secure to themselves the reversion of the $2\frac{1}{2}$ ana to devolve share of pergunna Koondee, under the deed which they stated to have been executed by their deceased brother Rajkishor. This to them on deed, as produced in Court, was dated the 29th of Kartic of the the death of the Bengal year 1206, corresponding with the 9th of December 1799, dow, judgment passed the day before Rajkishor's death. Subjoined to it was the following clause, "Should my widow, by evil advice, attempt to adopt a son, you will produce this in proof of my not having given favour, after her permission." The defendant, on the other hand, produced an *anmutipatra*, or deed sanctioning an adoption, purporting to be fabricated, from Rajkishor, under date the 30th of November 1799. Each of the parties alleged the document of the other to be a forgery. As the widow, it appeared to the Zillah Judge that the defendant, even under purporting the deed produced by the plaintiffs, was entitled to possession, to contain during her life, of the $2\frac{1}{2}$ ana share which had belonged to her authority husband; and the plaintiffs had not charged her with having from her transferred the share; the Zillah Judge, considering that no actual husband to injury had been sustained by the plaintiffs, and that the action adopt a son, could not be maintained until such transfer should take place, or the defendant should die, passed judgment, dismissing the suit.

On appeal by the plaintiffs to the Provincial Court of Moorshe-
dabad, that Court was of opinion, that, as the adoption made by
the widow, if duly authorized, gave the adopted son an immediate
title to the $2\frac{1}{2}$ ana share of the estate, and the plaintiffs alleged
the deed sanctioning an adoption to be a forgery, it was incumbent
on the Zillah Judge to have gone into proof as to the deeds. The

Saedpoor, and granted in like manner when that pergunna was under attach-
ment for the debt, on account of which it was ultimately sold. The pre-
sent case however differs from the former, in being originally a summary
action of ejectment for the recovery of possession only, though the right was
eventually determined, with the consent of the parties, and a precedent thereby
established for future cases of the like nature.

1807. requisite evidence having been accordingly taken and transmitted by the Zillah Judge, under an order from the Provincial Court, that Court passed judgment in favour of the claimants on the following grounds: From the evidence of the subscribing witnesses to the testamentary deed of Rajkishor, produced by the younger brothers, that document was considered to be established. Witnesses on the part of the widow deposed to the execution of the deed which she exhibited, bearing date the 30th of November 1799, and purporting to contain authority from her husband to adopt a son; but the Provincial Court considered its authenticity to be extremely doubtful, from an evident difference between the alleged signature of Rajkishor, and his name as subscribed to the testamentary deed; and also from the witnesses not agreeing in their evidence, when questioned as to the circumstances attending its execution. Besides, it appeared to the Court improbable, that Rajkishor, notwithstanding the formal deed executed the day before his death, declaring that he had not authorized an adoption, and disposing of his landed property in the manner therein stated, should have executed a contrary instrument, granting the authority in question. The Provincial Court, accordingly, rejected the deed exhibited by the widow, and pronounced that the adoption made by her was of no effect, and that the reversion of the 2½ ana share of the estate was the right of the claimants, on her demise. It was at the same time provided, that the widow should give security for the estate not being aliened by her, and for its being properly managed while in her possession; in default of which it was provided, that the Court of Wards should controul the management of it during her life. The costs in the Zillah and Provincial Courts were ordered to be paid by the parties respectively.

An appeal was preferred by the widow from the above decision to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fomhelle), the appellant still alleging the authenticity of the deed containing authority from her husband to adopt a son. On its production before the Court, it was observed, that, although the date of it was in November 1799, the stamp paper on which it was written, was numbered 352, of the year 1800. A reference was in consequence made to the Judge of Zillah Rungpore, who transmitted an examination of a native writer in charge of the stamp paper in the office of the Collector. This person deposed, that the number and year, as endorsed on the stamp paper on which the deed in question was written, was his hand writing, and related to the period of issuing the paper; and that it could not have been issued from the Collector's office in 1799, the date affixed to the deed written on it. The Sudder Dewanny Adawlut therefore, finally pronounced the deed to be a forgery, and confirmed the decree passed by the Court of Appeal in favour of the respondents; with this amendment, however, that security was not to be demanded from the appellant, but that, in the event of her appearing disqualified to manage the share of the estate, the Board of Revenue should appoint a manager, as directed by the regulations. (a)

(a) It being determined that the widow had a life interest only in her husband's landed estate, any alienation of it by her would of course be invalid and

J. QUEIROS, (Executor to the estate of GENERAL MARTINE), 1807.
Appellant,

versus

July 20th.

KHUDIJA SULTAN BÉGUM, and others, Heirs of NAWAB
NUJUF KHAN, deceased, (through their Attorney, J. B. FORTIER),
Respondents.

THIS was an action brought on the part of the heirs of Nujuf Khan, against the executor of General Martine, in the Zillah Court of Cawnpore, on the 22nd of March 1804, or 6th of *Chait* of the Nawab *Fuslee* year 1211, to recover the talook of Nagpoor, &c. otherwise Khan, a-c called Nujufgurb, consisting of 9½ mouzas in pergunna Jajmow; and to obtain a settlement of accounts with the defendant for the produce of the estate from the beginning of 1189 to the end of 1211. The annual produce was stated at 16,521 rupees. In the *Fuslee* year 1174, the estate in question was conferred by a royal grant from the King Shah Aulum, on the Nawab Nujuf Khan, exempt from revenue under the title of *altumgha*, and remained in his possession until 1179. In that year the Nawab went to Delhi, and left the estate, for the expences of his family, in charge of his sister, Khudijah Begum, on whose part it was held till the death of the Nawab, which happened at Delhi, in 1188. The Nawab had, in the year 1181, become indebted to Colonel Hannay, in the sum of 40,000 rupees; and to Colonel Polier, 47,327 rupees; total 87,327 rupees; and those gentlemen, on his decease, demanded payment of their debts; in consequence of which, Khudija Begum, in 1189, gave them a *tunkha*, or assignment, on the revenues of the estate, at the same time sending orders to her agent, in charge of the estate, directing the revenues to be paid to them until their demand should be liquidated. Soon afterwards, they dispossessed the Begum's people, and took the estate into their own hands. Khudija Begum represented the case to Mr. Hastings, then Governor General, from whom an answer was received, reciting, that as he understood it to have been owing to the negligence of the Begum's officers in paying the revenues to Colonels Hannay and Polier, the lands must remain with them until their debt was satisfied. In this Khudijah Begum acquiesced. Colonel Hannay died soon afterwards; and Colonel Polier, after being in possession four years, transferred the debt, and the interest of the assignees in the estate, to General Martine, who changed the name of it to Martingurb, and kept possession till his decease in 1207. The defendant, his executor, still retained it. It was set forth in the plaint, after a recital of the above circumstances, that the amount of the debt, for the liquidation of which the revenues of the estate had been assigned to Colonels Hannay and Polier, had long since been discharged by the revenues; and that, on an adjustment of accounts by the Court, from 1189, the year in which the assignment was given, to the end of 1211, a void. It appeared unnecessary therefore to require security from her, not to alienate the estate; and objectionable, as subjecting her to a probable charge or inconvenience. It is to be observed, that instructions were given to the Zillah Magistrate for bringing to trial the persons concerned in the forgery of the deed exhibited by the appellant, and in endeavouring to support its authenticity by perjury.

1807. period of 23 years, there would, after deducting the amount of the debt, (on which it was not admitted that interest was demandable), appear a considerable balance in their favour. The recovery of this balance, however, they reserved for a subsequent claim, stating themselves unable at present to pay the customary fees on the amount. The defendant pleaded, that, according to the admission of the plaintiffs themselves, Colonels Hannay and Polier had taken forcible possession 21 years ago; that it was therefore a case of trespass; and that the action was barred, by the lapse of time, under the rules of limitation contained in regulation 3, 1793. This plea was disallowed by the Zillah Judge, who, advertng to Colonels Hannay and Polier having taken possession in consequence of the assignment, considered the case analogous to a case of mortgage, in which the lapse of time, if computable at all, could only be computed from the liquidation of the debt, and settlement of accounts, the latter of which was allowed not to have taken place. In the instrument by which the estate was assigned on the part of Khudija Begum for the liquidation of the debt, there was nothing mentioned with respect to interest. It appeared proper to the Zillah Judge to allow annual interest at 12 *per cent* on the amount of the debt, but not for a longer period than 12 years before the institution of the suit. An account was accordingly drawn out, in which were calculated, on the one hand, the principal of the debt, and interest on it for 12 years antecedent to the action, and on the other, the produce of the estate down to the date on which the suit commenced. By this calculation it appeared that there was a balance of 121,709 rupees, due to the plaintiffs. The Zillah Judge, accordingly pronouncing the plaintiffs entitled to recover the estate, gave judgment in their favour for possession of it (on the 18th of June 1804), with costs against the defendant; leaving the plaintiff at liberty to sue for the balance in a separate action.

On appeal by the defendant from the above decision to the Provincial Court of Bareilly, the grounds of the judgment passed by that Court, amending the zillah decree, were as follow: The Provincial Court concurred in considering the rules of limitation not applicable to the case, more especially as it appeared from the letter of Khudija Begum to Mr. Hastings, as well as from other documents, that she had several times solicited an investigation into the case, which, owing to various obstacles, had not taken place; and that she, and the other heirs, had instituted the present suit on the first establishment of the Court of Zillah Cawnpore. From the circumstance of interest not being mentioned in the deed of assignment, and of its not being clear to the Court, whether the debt (originating apparently in the value of articles furnished to the Nawab), was originally meant to bear interest, the Court had doubts, on the first view of the case, whether any could be claimed by the appellant; but as it appeared that Khudija Begum, in a letter addressed to Colonel Scott, the resident at Lucknow, on the subject of redeeming the estate, stated her desire to redeem it on the principal and interest being discharged from the revenues, and therefore virtually admitted the right of the assignees to interest, the Provincial Court decided to

J. Queiros,
s. Khudija
Sultan Begum and
others.

to admit it. The following was the adjustment adopted by the Court, viz. 1807.

On one side.		R.	A.	P.	J. Queiros, c. Khudija Sultan Be- gum, and others.
Principal of the debt,		87,327	15	1	
Interest at 12 <i>per cent per annum</i> ; from be- ginning of 1189 to end of 1212, (24 years).....		251,505	0	0	
Principal and interest of the debt,		338,832	15	1	
On the other side.					
Realized from the assigned lands during the same period, at the rate of 14,121 rupees <i>per annum</i> , (viz. rupees 16,521 annual produce, minus rupees 2,400, annual charges of collection)		338,910	0	0	
Excess realized from the assigned lands....		77	8	3	

The decree of the Zillah Judge, as far as related to the recovery of the estate by the claimants, was in consequence confirmed by the Provincial Court. As the claimants, however, according to the above adjustment (brought forward a year subsequent to the institution of the suit, in 1211), had sued in the Zillah Court for the redemption of the estate before the debt had been liquidated, and the other party, instead of offering a fair account, appeared to the Provincial Court to have made unfounded objections to the redemption, it was directed that the costs, in the Provincial and Zillah Courts, should be paid by the parties respectively.

The executor of General Martine being dissatisfied with the above decision, and still insisting that the action was barred under the rules of limitation before pleaded, and, even were it not barred, that the debt, including interest, which the appellant claimed at 24 *per cent*, was still unliquidated, preferred an appeal to the Sudder Dewanny Adawlut. But on full consideration of the merits of the case, a decree more favourable to the respondents was passed by that Court. The plea of the appellant, relative to the suit being barred by lapse of time, was disallowed for the reasons hereafter specified. The principal of the debt in 1189, was clearly 87,327 rupees; and the annual produce of the lands assigned for the payment, as specified in the *firman*, and as stated by the respondents, was 16,521 rupees. The appellant demanded a deduction from this sum for discount on *Corah* rupees; but it was not allowed by the Court, as it appeared from the *firman*, that *Sicca* rupees must have been intended; and besides, though the above sum was adopted as the annual produce, on the statement of the respondents, there was proof that it was less than the average amount actually collected. As observed by the Zillah and Provincial Courts, there was no mention of interest on the debt, in the instrument of assignment. The two letters from Khudija Begum to her agent in charge of the estate, also made no mention of interest; and from the purport of the first letter, directing the speedy liquidation of the debt due to Colonel Hannay, there appeared ground to believe that, at that time, only the payment of the principal, from the produce of the estate, was in contem-

1807.

J. Queiros,
v. Khudija
Sultan Begum and
others.

plation. Yet as Khudija Begum, in her subsequent letter to the resident at Lucknow, dated in 1207, appeared to have agreed to the payment of principal and interest from the produce of the lands, the Sudder Dewanny Adawlut concurred with the Provincial Court in considering the appellant entitled to interest on the debt. The appellant asserted a right to it at 24 *per cent*; but there was no trace of any stipulation for it at that rate; and it was evident to the Court, that such interest could not have been stipulated, as the annual amount of it would have exceeded the annual produce of the lands. From the written contract, moreover, by which the debt, and interest in the estate, were transferred to General Martine, dated in 1785, it appeared that 12 *per cent* was the rate of interest then mentioned by the assignees as due. The Court therefore determined, that the interest allowed should be at the rate of 12 *per cent*; and, on a view of all the circumstances of the case, especially there not having been originally any stipulation for the payment of interest, and the presumption that Khudija Begum's subsequent agreement to the payment of principal and interest, intended a previous discharge of the principal, from the annual collections, in conformity with the assignment for that purpose, it appeared proper to the Court to adopt an equitable adjustment, on a calculation of the net produce of the assigned lands, annually received by the assignees, by considering such receipts applicable in the first place to the discharge of the principal of the debt, and allowing the assignees (or their representative, the appellant) interest at the rate abovementioned, on each instalment of the principal, as liquidated, to the time of its liquidation, from the date on which the debt was contracted. The adjustment thus adopted was as follows:

1st, Realized from the assigned lands in 1190, (16,521 rupees, minus 1,817 rupees, charges of collection at 11 <i>per cent</i>).....	Rs. 14,704
Ditto.in 1191.....	14,704
Ditto.....in 1192.....	14,704
Ditto.....in 1193.....	14,704
Ditto.....in 1194.....	14,704
Ditto.....in part of 1195.....	13,807

Principal of the debt..... 87,327

Leaving 897 rupees, surplus produce in 1195, applicable to payment of interest.

2d, Interest payable as follows, viz:

Interest on the sum of 14,704 rupees paid in 1190, in part of the principal, at 12 *per cent per annum*, from the beginning of 1182, the period when the debt was contracted, to the end of 1190, (9 years)

	R.	A.	P.	G.
Ditto on rupees 14,704, paid in 1191, (10 years)	15,888	5	1	2
Ditto on ditto, paid in 1192, (11 years)	17,664	12	15	2
Ditto on ditto, paid in 1193, (12 years)	19,409	4	8	2
Ditto on ditto, paid in 1194, (13 years)	21,173	12	2	0
Ditto on ditto, paid in 1194, (13 years)	22,938	3	15	2
Ditto on rupees 13,807, paid in 1195, (14 years)	23,105	12	2	2

Total interest due 120,242 2 5 0

	R.	A.	P.	1807.
The above interest was paid as follows, viz :				
Surplus produce in 1195, applicable to payment of interest,.....	897	0	0	J. Queiros, v. Kundija Sultan Begum and others.
Interest paid by net produce of the estate, (rupees 14,704 <i>per annum</i> .) from beginning of 1196, to end of 1203, (8 years).....	117,632	0	0	
Ditto in part of 1204,	1,713	2	5	

Total payment of interest, 120,242 2 5
 Leaving a surplus payment, in 1204, of 12,990 rupees, 13 anas, 5 pie, (viz : rupees 14,704, minus 1,713 rupees, 2 anas, 5 pie) in favour of the respondents.

According to the above adjustment, the whole amount (principal and interest) of the debt was liquidated in 1204; and possession of the estate was then demandable by the respondents. The plea of the appellant, that the suit was barred on account of lapse of time, was rejected by the Court on two grounds, first, because the present was clearly a case of virtual mortgage, or assignment, and therefore (as expressly stated in the 4th clause of section 3, regulation 2, 1805,) a case to which the rules of limitation are not applicable; second, even supposing that the rule of limitation, pleaded by the appellant, restricting the cognizance of suits to twelve years from the cause of action, were applicable, yet the cause of action in the present suit could only be considered to have arisen from such time as the appellant was in wrongful possession of the assigned lands, after the liquidation of the debt for which the assignment was given; and, according to the adjustment above stated, the debt was only liquidated in 1204, between which, and the date of the action, twelve years had not elapsed. The Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle) accordingly confirmed so much of the decrees of the Zillah and Provincial Courts, as adjudged possession of the estate to the respondents; and at the same time decreed to them the profits accruing since the date of the Zillah decree; with costs in each of the Courts. A motion was made on the part of the respondents, for obtaining under the present decree the balance due for the years antecedent to the decree of the Zillah Court; but it was stated to them by the Sudder Dewanny Adawlut, that in case of the appellants refusing to refund the amount, a further action must be brought for it, as the declared object of the present suit had been merely to obtain possession of the estate. (a)

(a) An appeal to the King in Council from the above judgment is still depending : but this did not appear to be a sufficient reason for omitting the report of the case in its proper place and order. It may be added, that the circumstances which governed the decision being of a special nature, as stated in the report, it will not furnish a precedent for the general adjustment of accounts between proprietors of land, and assignees, or mortgagees, when there may be no stipulation, express or presumptive, for the application of the annual receipts to the discharge of the principal in preference to the interest.

1807. JUGGUT RAM, *Gomashta* (on the part of the banking house of
URJUNJEE NATHJEE, at Casimbazar), Appellant,

July 24th.

versus
ENAYUT ULLAH, Respondent.

On a claim against a banking house, for money paid as a deposit, bearing interest, into the hands of its late head *gomashta*, there being proof adduced, that the *gomashta* had also separate dealings of his own as a banker, and that the deposit was made with him individually, and not on the credit of the house, adjudged, that he alone was responsible.

THIS was an action brought by Enayut Ullah, in the City Court of Moorshedabad, on the 6th of December 1803, or 22nd of *Aughun* of the Bengal year 1210, against Juggut Ram, *gomashta* of the banking house of Urjunjee Nathjee, and Govind Das, late *gomashta* of the house, for the recovery of 7,979 rupees, as balance due of the sum of 10,000 rupees, stated to have been deposited by the plaintiff in the banking house of Urjunjee. It was set forth in the plaint, that the deposit of 10,000 rupees was made at three different times during the months of *Aughun* and *Phaugun* of the Bengal year 1209, with the house of Urjunjee, and that it was paid by Bholanath, a servant of the plaintiff, into the hands of Govind Das, at that time head *gomashta* of the banking house of Urjunjee, with a stipulation that it should be repaid at the plaintiff's convenience, with 8 anas *per cent* monthly interest. The plaintiff acknowledged having received from Govind Das some small sums in part payment of the money, as well as a draft on Calcutta for 1,287 rupees (yet unpaid), after deducting the whole of which from the amount of the deposit and the interest due on it, there remained due to the plaintiff the sum demanded. The defendant Govind Das did not appear, the other defendant denied that any deposit had been made with the banking house to which he was *gomashta*, or that the plaintiff had ever any dealings with it. He added, that Govind Das, during the time he was *gomashta* to the house of Urjunjee, had distinct transactions of his own, in a separate house, and that, being the person into whose hands the plaintiff professed the money to have been paid, he must be exclusively responsible for it. A voucher for the deposit was produced in Court by the plaintiff, signed "Govind Das, *gomashta mohktarkur* of the house of Urjunjee Nathjee. In the books of the house of Urjunjee, as produced in Court, there was no entry relating to the deposit; and it appeared from the evidence of a person engaged in the business of a banker, that it was customary for managing *gomashtas*, in the situation which Govind Das held at the time, to sign simply the firm of the house, and not their own name, in written transactions for the principals. The Zillah Judge was in consequence of opinion that no responsibility attached to the house of Urjunjee. It being proved, however, from the evidence of Bholanath, and others, concerned in carrying the money, that the alleged amount was actually delivered into the hands of Govind Das, viz. 4,000 rupees at one time, 2,000 rupees at another, and at a third, an accepted bill on Bunchanun Seel, a banker, due on the same day; and it appearing to the City Judge, that Govind Das was the person responsible to the plaintiff, judgment was given in the City Court against him only, for the amount demanded, with costs.

Enayut Ullah was dissatisfied with the above decision, (Govind Das, against whom it was passed, not being forthcoming) and appealed from it to the Provincial Court of Patna. That Court did

not concur in it, for the following reasons; first, it appeared to the Provincial Court, that the omission of the transaction in the books of the house of Urjunjee (without meaning to impeach their credit) might have been accidental, and was not conclusive as to the house not having been concerned in the transaction; second, it was not denied that Govind Das was, for some time, head *gomashtha* of the house, and transacted business in that capacity when the deposit in question was made; and the Court considered that a commercial house was accountable for all sums paid into the hands of its accredited *gomashtha*, under the faith of such person acting with the general authority of his principals. It was in consequence held, that the deposit in question, made on the part of Enayut Ullah into the hands of Govind Das, while head *gomashtha* of the house of Urjunjee, was a transaction for which the house was responsible. The decree of the City Court was accordingly reversed, and it was adjudged, that the sum demanded, with interest at 12 per cent from the date of the action, should be recovered by the claimant from the house of Urjunjee, a right of action being at the same time reserved to the claimant, for the amount of the draft on Calcutta, granted to him in part payment of the deposit, should it not have been received.

Juggut Ram having appealed, on the part of the banking house, from the decision of the Provincial Court of Moorshedabad to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), the following were the grounds on which final judgment was passed on the case. The Court were satisfied that the deposit had been made, as stated by the respondent, with Govind Das, while head *gomashtha* to the house of Urjunjee; but there was proof that Govind Das had, at the same time, distinct transactions on his own account, carried on in a separate house, under the firm of Govind Das and Doolubh Das his son. The original draft on Bunchanun Seel, for 4,000 rupees (which formed a part of the deposit), and an extract from the books of Bunchanun Seel having been sent for and obtained by the Court, at the instance of the appellants, it was found, that the draft had been endorsed over by Bholanath (the respondent's agent) to Doolubh Das, and that the amount of it had been credited by Bunchanun Seel to Govind and Doolubh Das, and not paid to the house of Urjunjee, or carried to their account. It further appeared, on an inspection of the books of account found in the separate house of Govind Das and Doolubh Das, at the time the former absconded, that the particulars of the deposit and of the partial payments stated by the respondent, were entered in those books as a concern of Govind Das's house. In addition to these circumstances, the *gomashtas* of several respectable houses gave it as their opinion to the Sudder Dewanny Adawlut, after examining the voucher signed by Govind Das, that the deposit did not concern the house of Urjunjee. The Court, therefore, did not consider Govind Das to have used the name of the house, to which he was *gomashtha*, in the transaction with the respondent, or the money to have been deposited with Govind Das on the credit of the house. It was ascertained to be a frequent custom among the *gomashtas* of banking houses to have separate dealings of their own in the business of a banker,

1867.

Juggut
Ram, v.
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lah.

1807. as had been the case with Govind Das in the present instance : and the Court considered it to be proved, that the money deposited, or rather lent at interest, by the respondent, had been received and used by the *gomashta*, Govind Das, on his private and separate account. As the money had not been applied by the *gomashta* to the use of his principals, nor received into their house : and the *gomashta* had not bound his principals by any express agreement in their name ; the Court decided that they were in no respect answerable for it. Final judgment was therefore passed by the Sudder Dewanny Adawlut reversing the decree of the Provincial Court, and confirming that passed by the City Judge, declaring the amount demanded to be recoverable only from Govind Das. It was ordered that the respondent should pay his own and the appellant's costs in each of the Courts. (a)

1807.

JUGESUR MUSTOFEE, Appellant,

versus

Aug. 3d.

SHAMMOHUN RAI, and another, Respondents.

THIS was a summary action brought by Jugesur Mustofee in demand by a farmer on two under-renters, for possession of lands for which they were in balance at the end of the first year of a lease which had been granted to them, and refused to give up, summary judgment for the farmer, by the Zillah Court, under regulation 7, 1799.

the Zillah Court of Burdwan, on the 4th of September 1805, or 21st of *Bhadon* of the Bengal year 1212, to recover from Shammohun Rai, and another, possession of the mouzas Salahpoor, &c. nine in number, together with the amount of rents collected by the defendants during alleged illegal possession. The plaintiff held in farm, from the zemindar, pergunnah Hooela, in which these mouzas are situated. He stated, that, in the beginning of the Bengal year 1211, he granted a lease of the mouzas, for four years, to the defendants, as under farmers, at an annual rent of 4,812 rupees, with a stipulation that the full amount of the rent should be annually discharged, under penalty of the lease being taken from them, and given to some other person ; that, at the expiration of the first year, there was a balance of 1,703 rupees, due from the defendants, and on their not discharging it, the plaintiff, according to the penalty of their engagement, and in conformity with the rules contained in clause 7, section 15, regulation 7, 1799, granted a lease of the mouzas to one Brijmohun Bunojah ; notwithstanding which, the defendants retained forcible possession, not allowing the plaintiff's lessee to enter, and still made the collections of the lands. The defendants alleged, that their lease had been illegally broken off before the expiration of the term for which it was granted to them, pleading, first, that one of the mouzas, the rent of which was rated at 831 rupees, had never

(a) As this judgment was founded entirely on the evidence in the case, it can be no precedent against holding a banking house responsible for money paid to its accredited agent, in a transaction already shewn to have been with the house, and not with the agent individually, as in the present instance. See the case of *Mr. Nowell versus Mootee Ram*, July 15, 1805, for an instance in which the managing agent of a banking house, transacting business in the name of his principals, was not held personally answerable for the debts of the house.

been given into their possession; second, that besides the amount of rent which the plaintiffs received from them, for 1211, they tendered the remaining balance, but that the plaintiffs evaded accepting it. These pleas however were not substantiated; and the Zillah Judge being of opinion, that the plaintiff, in granting a new lease to Brijmohun Bunojah, had only acted up to his stipulation with the defendants, as well as in conformity with the regulation quoted by him, and that the defendants, independently of force appearing to have been used by them, had illegally excluded the plaintiff's lessee; a summary judgment was passed in the Zillah Court, under the 15th section of regulation 7, 1799, for the plaintiff's recovering possession of the mouzas from the defendants, together with 300 rupees, the amount of collections made by them since the date of the lease given to the new lessee. It was at the same time directed, that the defendants, for having retained possession of the lands, as they appeared to have done, by force, should pay a fine of 100 rupees to Government.

1807.
Jugseer
Muntofee,
v. Sham-
mohun
Rai, and
others.

On an appeal preferred by the defendants to the Provincial Court of Calcutta, in which it was pleaded that regulation 7, 1799, was irrelevant to the case, that Court was of opinion that the 49th regulation of 1793, was the rule by which the case should be decided, and that, as no force was established to have been used by the under farmers, which could subject them to the provisions contained in the latter regulation, respecting forcible ejectment, the summary decision passed against them by the Zillah Judge was not authorized; and it was accordingly reversed by the Provincial Court; with costs, of both Courts, payable by the farmer.

A special appeal from the above decision, on the part of the farmer, having been admitted by the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), the Court observed, that the summary judgment for forcible ejectment, authorized by regulation 49, 1793, was totally unconnected with the summary judgment, in cases of arrears of rent, prescribed by the 15th section of regulation 7, 1799; that the rules of the former regulation were irrelevant to the case; and that the summary judgment passed under the latter regulation by the Zillah Judge, against the respondents, as under-renters in balance at the end of the year, was just and regular, with an exception of the fine of 100 rupees, which was not authorized by the regulations. The decree of the Provincial Court was therefore reversed by the Sudder Dewanny Adawlut, and that of the Zillah Judge (excepting the fine) confirmed, with costs in each of the Courts against the respondents, and with an option to them, as the judgment was summary, to bring a regular suit for the trial of their right of possession, if they thought themselves aggrieved. (a)

(a) The rule on which the final judgment in this case was grounded, is contained in the 7th clause of section 15, regulation 7, 1799, which prescribes what measures may be taken by landholders and farmers for the security of their future rents, if the arrears due to them from their under-tenants be not liquidated within the current year, by the process described in the preceding clause of that section. It is therein declared, that if the defaulter be a leaseholder, having a right of occupancy only so long as a certain rent be paid, without any right of property, or transferable possession, the proprietor or farmer, from whom the defaulter holds his tenure, has the right of ousting him from the

1807.

Aug. 10th.

RAJA RAJKISHEN, (zemindar),^{*} Appellant,*versus*

RAMNARAEN, (talookdar), Respondent.

On a summary suit under regulation 7, 1799, by a zemindar against a dependent landholder, for arrears of rent calculated according to a survey and measurement, to which suit the defendant pleaded a right to hold his tenure at a fixed rent, the Zillah Court competent to pass a summary decision; with a regular suit at the option of the party cast.

THIS was a summary action under regulation 7, 1799, brought by the zemindar, in the Zillah Court of Tipera, on the 23d of August 1804, or 8th of *Bhadon* of the Bengal year 1211, to recover from the talookdar the sum of 554 rupees, as arrears of rent accruing in about four months of the year 1210, on account of the talook Joar Dooareah, &c. held by the defendant, and situated in a zemindaree lately purchased by the plaintiff. It was stated in the plaint, that the defendant having failed to enter into any engagement for his lands, the plaintiff had assessed them, according to a survey and measurement, at 2,218 rupees *per unnum*; and that he demanded the sum in question as arrears, at that rate, for the period stated in the claim. The defendant denied the plaintiff's right of assessing his lands, and alleged that he was entitled to hold them on a *mokurreree* tenure, at a fixed annual rent of 399 rupees. In support of this, the defendant produced a *potta* or lease from the late zemindar, under date the 27th of *Bysakh* 1198, fixing his rent indefinitely at the amount stated by him; but as this was contrary to the 2nd section of regulation 44, 1793, which directs that the rent of a dependent landholder shall not be fixed for a longer term than ten years, and that any engagement fixing the rent of such landholder in opposition to that rule shall be void, the Zillah Judge pronounced the engagement in question to be of no effect. And as the defendant had entered into no engagement with the plaintiff, and had shewn no cause why the rate assessed on his lands by the plaintiff should not be paid by him, the arrears demanded were adjudged to the plaintiff in the Zillah Court, by a summary sentence, with costs.

On an appeal being preferred by the talookdar from the above sentence to the Provincial Court of Dacca, on the plea that the case was not determinable on a summary enquiry, it appeared to that Court, that, as the zemindar asserted a right of assessment according to the ascertained assets, and the talookdar pleaded an *istimreree* title, the case was cognizable only as a regular suit. The summary decision passed by the Zillah Judge of Tipera in favour of the zemindar, was therefore annulled by the Provincial Court, as irregularly passed.

On a special appeal by the zemindar from the above decision of

tenure he has forfeited by a breach of the conditions of it. It is further declared that, in such cases, proprietors and farmers of land are at liberty to exercise the just powers appertaining to them, without any previous application to the courts of justice. But as, in the present instance, the under tenants resisted the farmer's attempt to exercise his just powers, the Court, in consideration of the general spirit and intention of the clause above noticed, construed it to authorise the summary interposition of the Zillah Judge, on application from the farmer, to enforce his right of removing a defaulting tenant, in like manner as it expressly provided for bringing to sale, by application to the Dewanny Adawlut, a dependent talook, or other transferable tenure, in satisfaction of an arrear of rent, due, at the end of a year, from the holder of such tenure.

the Provincial Court to the Sudder Dewanny Adawlut (present 1807. H. Colebrooke and J. Fombelle); this Court held, that the Zillah Judge was competent to decide summarily on the question between the parties, under regulation 7, 1799; that therefore an appeal was not open from his decision to the Provincial Court, it being specified in the 18th section of the above regulation, that there shall be no appeal from the summary decision which it authorizes; but that an option shall be left to the party east to institute a regular suit. The Sudder Dewanny Adawlut in consequence annulled the decree of the Provincial Court, leaving the respondent, against whom the summary sentence of the Zillah Judge was passed, to bring a regular action in the Zillah Court, if he thought himself aggrieved. The costs in the Sudder Dewanny Adawlut were made payable by the respective parties. (a)

SHAMCHUNDER and ROODERCHUNDER, Appellants, 1807:
versus
NARAYNI DIBEH and RAMKISHOR RAI, Respondents. Aug. 21st

THIS was an action brought by Shamechunder and Rooderchunder in the Zillah Court of Mymensing, on the 29th of May 1799, or 18th of Jeth of the Bengal year 1206, to recover from Narayni Dibeh and Ramkishor Rai, a 4 ana share of pergunnah Mymensing, &c forming the estate of the late Kishenkishor Rai. The annual produce of the 4 ana share was stated at 45,415 rupees. The family of the parties was as follows:

SRIKISHEN, zemindar of Mymensing, &c. left four sons, the 1st and 2d by one wife; the 3d and 4th by another				may be two successive adoptions, under due authority for that purpose, by the widows of the same man; and an adopted son suc- ceeds colla- terally as well as lineally in the family
1st.	2d.	3d.	4th.	
Kishenkishor Rai, zemindar of 4 anas in dispute, died in 1171, without issue, leaving two widows, viz. 1. Rutun Mala, who died in 1191, after adopting Nundkish- or; 2. Narayni Di- beh, (<i>defendant</i>), who adopted Ram- kishor Rai (<i>defen- dant</i>), after Nund- kishor's death.	Gopalkishor, had no issue; but adopted Joogul- kishor.	Gunganarsen.	Lukhinarsen, left two sons, viz. Shamchunder and Rooderchunder, (<i>plaintiffs</i> .)	

(a) The final judgment in this case was founded on the terms and construction of the 4th clause of section 15, regulation 7, 1799. It is therein directed, that "when a defaulter, or his surety, may be brought to the Zillah Court, under either of the two preceding clauses, the Judge shall call upon him to answer the demand against him, and, if he deny it, or any part of it, shall enter upon a summary enquiry into the merits of it, by examining the vouchers and accounts of the parties." This was done in the present instance, and it appeared indispensable, with a view to ascertain whether the arrears claimed were due, or not.

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chunder
and Rooder-
chunder, v.
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Dibeh and
Ramkishor
Rai.

The plaintiffs, in support of their claim to the 4 ana share in dispute, alleged, that the defendant, Narayni Dibeh, had not been duly empowered to adopt Ramkishor; that, on the decease of Nundkishor, adopted by Rutun Mala, the zemindar's elder widow, and therefore by law proprietor of the whole 4 ana share, the plaintiffs were his heirs, as nephews of Kishenkishor, his adoptive father. The defendants, first, contradicted the assertion of the plaintiffs with respect to the illegality of Ramkishor's adoption; second, insisted, that as the plaintiffs were only sons of the half brothers of the adoptive father of Nundkishor, the distant degree of relationship which they bore to Nundkishor, would not entitle them to succeed to his property. On referring to the proceedings in another cause before tried by the Zillah Court, it appeared to the Zillah Judge, that the question at issue had been already virtually decided. In the cause alluded to, a claim had been preferred against Narayni Dibeh, by Joogulkishor (who was adopted by Gopalkishor, brother of Kishenkishor), for 2 anas of it, by right of succession to Nundkishor. Evidence was at that time taken as to the adoption of Ramkishor by Narayni Dibeh under authority from her husband; and it was deposed by witnesses, that permission had been granted her verbally, in their hearing. On the ground of this being related by the witnesses from memory, after a long lapse of time, and of its being thought that suspicion attached to some documents brought forward on the occasion, it was not thought proper to admit the adoption. A reference was then made to the pundit of the Court, as well as to those of the adjacent zillahs, and of the Sudder Dewanny Adawlut, to ascertain, whether the succession to the 2 anas, held by Nundkishor, was vested, by the Hindoo law, in Narayni Dibeh, the surviving widow of Kishenkishor; or in Joogulkishor, the adopted son of Kishenkishor's brother; or in Shamchunder and Rooderchunder, sons of his half-brother? The answers returned by the pundits of several zillahs were contradictory; but the solution of the question, as given by the pundits of zillah Tipera, and of the Sudder Dewanny Adawlut, was that Joogulkishor, as adopted son of Kishenkishor's brother, was legal heir to the 2 ana share; and judgment was passed accordingly in Joogulkishor's favour. In the present case, therefore, the Zillah Judge being of opinion that the plaintiffs (Shamchunder and Rooderchunder,) were not entitled to any part of the 4 ana share in dispute, judgment was given against them in the Zillah Court, with costs.

The plaintiffs appealed from the above decision to the Provincial Court of Dacca. It appeared that, on the 4th of December 1801, a decree was passed in appeal by the Sudder Dewanny Adawlut in a cause between Narayni Dibeh and Hurkishor (son of Joogulkishor who was adopted by Gopalkishor,) on which appeal the pundits of the Sudder Dewanny Adawlut gave an opinion, that the heir of Nundkishor would be Hurkishor, not Narayni Dibeh, as she was not mother, but stepmother; but that if she had authority to make an adoption, then Ramkishor, having been adopted by her, would be heir to Nundkishor, as his adoptive brother. The Provincial Court were satisfied with the evidence given in the former cause, in the Zillah Court of Rungpore, with respect to the autho-

vity for adopting Ramkishor, and held it to be established that he was duly and legally adopted; and it being in consequence considered that the appellants were entitled to no part of the 4 ana share, the appeal against the zillah decree was dismissed with costs. 1807.

On a further appeal by Shamchunder and Rooderchunder to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), the pleas set up by them against the foregoing decrees were, first, that the adoption of the respondent Ramkishor, being a second adoption in the family of the same man, was illegal; second, that, even admitting two adoptions to be legal, one adopted son could not succeed to the property of the other adopted son, as the collateral heir. The questions of Hindoo law, connected with the case, were proposed by the Court to their pundits in the following form: After the death of Kishenkishor, zemindar of the 4 ana estate, without issue, his elder widow having adopted Nundkishor; and when the elder widow, and Nundkishor died, his younger widow having adopted Ramkishor; and claims to the estate having been preferred by Ramkishor; by Joogulkishor, the adopted son of Kishenkishor's brother; and by Shamchunder and Rooderchunder, sons of Kishenkishor's half brother; which of the claimants is heir at law to the property? and in the case of two adopted sons of a common adoptive father, can one, on the decease of the other, succeed to his property as the collateral heir? In answer to this reference, it was stated by the pundits, that, "if, after the death of Kishenkishor, his elder widow, duly authorized, adopted a son, that son was proprietor of the estate; and if, after the death of that son, the younger widow also adopted a son, under due authority, then, provided the adopted son of the elder widow left no issue, or brother by the mother who adopted him, his property would devolve on the adopted son of the younger widow of Kishenkishor, and not on the adopted son of Kishenkishor's brother, or on the sons of his half-brother: The succession to one adopted son is vested in the other adopted son, as being the nearest collateral." The Court of Sudder Dewanny Adawlut agreed with the Provincial Court of Dacca, with respect to the adoption of Ramkishor by Narayni Dibeh being proved to have been duly authorized; and as, under the above opinion of the pundit, it appeared, that two adoptions in the family of the same man are valid; that an adopted son succeeds collaterally as well as lineally in the family of his adoptive father; and that Ramkishor was the rightful heir to the whole 4 ana estate in contest; the claim preferred to it by the appellants was pronounced to be inadmissible. The appeal was in consequence dismissed by the Sudder Dewanny Adawlut, with costs. (a)

(a) The right of a son by adoption to inherit from his collaterals in the family of his adoptive father, was established by the decision in this cause, as well as the lawfulness of two successive adoptions, by the widows of the same person, under authority for that purpose from their husband.

1807.

BHUNJUN SING, Appellant,

versus

Sept. 4th.

MOHER SING, Respondent.

Claim by A, THIS was an action brought by Moher Sing in the Zillah Court on B, a of Tirhoot, on the 5th of February 1805, or 21st *Magh* of the landed pro- *Fuslee* year 1212, to recover from Bhunjun Sing the sum of prietor, for 7,409 rupees, as the produce, from *Asarh* 1204 to the end of the produce 1209, of 662 beegas of land situated at Lodipoor Poosa, and of lands, of 1209, of 662 beegas of land situated at Lodipoor Poosa, and which a occupied on the part of Government for the Company's stud. lease had been grant- The defendant, the proprietor of these lands, about the end of ed to the claimant 1203, gave a lease of them to the superintendent of the stud, for ten years, at an annual rent of 1,323 rupees. The plaintiff, however, for four years, and renewed in the same year for ten years further, but posses- sion taken from him in favour of a new lessee. Produce adjudged until the end of the first lease. The renew- ed lease invalid, as being in op- position to section 2, regulation 44, 1793.

Mr. Hunter, an indigo planter, in whose service the plaintiff was employed, and therefore were void under regulation 38, 1793, which prohibits lands being held by any European, directly or indirectly, without permission from Government; 3rd, that on this ground, the first lease to the plaintiff had been pronounced illegal, and set aside by the Board of Revenue at the time of the defendant's agreeing to let the lands to the superintendent of the stud. The Judge of the Zillah Court, considering that both the leases were void under section 2, regulation 44, 1793, from a renewal of the original one having been granted in the first year of its term, was of opinion that no part of the plaintiff's claim could be maintained, and accordingly gave judgment against him, with costs.

On appeal by the plaintiff from the above decision to the Provincial Court of Patna, that Court held, that the decennial lease granted to the claimant, as being the renewal of a former lease before the last year of its term, and therefore contrary to the 2nd section of regulation 44, 1793, was void: but that the former lease, granted for four years, was not invalidated thereby; nor the

claim of the plaintiff to recover under that lease. In support of the statement of Bhunjun Sing, that Mr. Hunter was the real lessee, and not the claimant, two documents had been filed by him in the Zillah Court, viz. first, a paper relating to the terms of the first lease, countersigned with the initials of Mr. Hunter's name; second, papers of *Jumma wasil bauky*, stating part of the rent to have been paid through Mr. H.'s factory. It appeared to the Court that although, from these papers, there was a suspicion that Mr. H. might have been concerned in the lease, yet they afforded no legal proof of the fact; and it was held, that, without further proof, the plea of Bhunjun Sing, under the regulation prohibiting lands being held by an European, could not avail against the lease. The Provincial Court accordingly gave judgment, partly in favour of the claimant, for the produce of the lands during so much of the period specified in the claim as was included in the first lease; viz. 190 rupees, balance of 1204; 1,323 rupees, produce of 1205; and the same for 1206; with interest on these several sums. A proportion of the claimant's costs, equal to the part of his claim adjudged to him, was made payable by the other party.

It is to be observed that, before the present suit, an action had been brought by the claimant in the Zillah Court of Tirhoot, on the original lease, for the sum of 2,657 rupees, as the produce of the lands in question for the former part of the period, viz. from the beginning of 1203 to *Jeth* 1204; and that he obtained a judgment in the Zillah Court, which the Provincial Court of Patna affirmed in appeal. Bhunjun Sing was at that time refused a further appeal to the Sudder Dewanny Adawlut, because the value then adjudged against him was not of an amount appealable to the Superior Court; but the Sudder Dewanny Adawlut declared at that time, that, in the event of another judgment against him for the produce of the remaining years of the first lease, he might have an appeal on the whole question. An appeal was accordingly preferred by him to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), from both the decrees of the Provincial Court, principally on the plea before urged, of the lease being void under the regulation prohibiting lands being held by an European. Some further papers having been adduced by the appellant in support of this plea, and the appellant appearing to have stated in the Zillah Court, that the four years lease had been set aside under an order from the Board of Revenue, an application was made to that Board by the Sudder Dewanny Adawlut for any proceedings which might have been held on the subject of the lease in question. From the answer of the Board it appeared, that though the lease had been suspected to be in favour of Mr. Hunter, it had not been ascertained to be so, and that no order had been passed against it; that Moher Sing had been considered the legal holder of it; and further, that on the lands being let to the superintendent of the stud, the appellant had engaged to satisfy Moher Sing, the prior lessee. The Sudder Dewanny Adawlut, therefore, pronounced the original lease to be good and valid, and coinciding in opinion with the other Courts respecting the invalidity of the renewed lease, confirmed the judgment passed by the Provincial Court in favour of the respondent's claim to the produce of the

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Sing.

lands during the term of the original lease, and dismissed the appeal, with costs. (a)

1807.

MUSSUMMAUT HYATEE KHANUM, Appellant,

versus

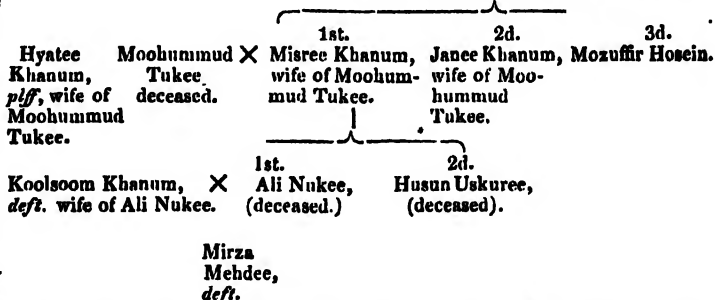
Sept. 4th.

MUSSUMMAUT KOOLSOOM KHANUM, and MIRZA MEHDEE, Respondents.

On a claim by A (female) against B and C, for possession of certain lands, as trustee of a religious establishment, it being proved that the lands had been assigned for an endowment, but that the person who assigned them, and settled the trusteeship on the claimant, was proprietor of only an 11 ana share of them, the endowment upheld for that proportion only, and possession adjudged to the trustee. The assignment of an undefined share held valid, by the *Futwa* of the law officers, on the authority of Abou Yoo-

THIS was an action brought by Hyatee Khanum, in the Zillah Court of Rungpore, on the 7th of April 1803, or 26th *Cheit* of the Bengal year 1209, against Koolsoom Khanum and Mirza Mehdee, to recover the mouzas Koobdee, &c. five in number. Their annual produce was estimated at 8,501 rupees, and they were stated to be held at a fixed *jumma* of rupees 2,916. The plaintiff was the widow of a person named Moohummud Tukee; and the defendants were, the first, the widow, and the second, the son, of the late Ali Nukee, son of Moohummud Tukee; as will appear from the following sketch of the family:

ABDUL SUBHAN, left three children.



On the 2nd of *Bhadon* 1197, or 15th of August 1790, Moohummud Tukee, the husband of the plaintiff, being then in possession of the lands in question, appropriated them to the endowment of a mosque at Rungpore, and executed a deed to the plaintiff entitled *Tumleek-o-towleut nameh*, or deed of gift and trust, to the following effect; "I, being in possession of mouzas Koobdee, &c. as sole proprietor, hereby endow a mosque with them, and confer the trusteeship on my wife Hyatee Khanum, to defray with their profits the charges of the establishment. Of the surplus, which may remain after defraying these charges, the trustee shall reserve to herself 9½ anas; and the remainder be shared by my other wives. The trustee shall appoint all officers, and may bequeath the trusteeship to whom she pleases. If she name nobody to succeed to it, it shall devolve, after her death, on any worthy son or grandson of mine, excepting Ali Nukee, whom I

(a) The decision in this case supports the object of section 2, regulation 44, 1793, viz. that no leases shall be granted for a term exceeding ten years; while, at the same time, it maintains the validity of leases within that period, by rendering void any illegal renewals only.

debar and disinherit." The plaintiff alleged that she had held 1807. possession, under this deed, during the life of her husband, but — that, on his decease in 1201, the lands were illegally taken possession of by the late Ali Nukee, his son; and that Ali Nukee had been succeeded by the defendants, the present occupants, against whom the plaintiff sued. The defendants denied that the late Moohummud Tukee had any right to the lands, and stated, that he merely held them as manager on the part of his son, with whom he afterwards quarrelled; and that he could have had no authority to endow them. They affirmed, that the original proprietor of them was Abdul Subhan, the maternal grandfather of Ali Nukee; and that Ali Nukee, to whom they (the defendants) were heirs, and had succeeded, was the legal hereditary proprietor, in right of his mother, and in possession as such at the time of his decease. The plaintiff, to prove the right of Moohummud Tukee in the lands, adduced a *sunnud*, bearing date in the Bengal year 1186, from the widow of Rusik Ram, former zemindar of the *chukla* in which the lands are situated, reciting a prior *sunnud* to Moohummud Tukee from the zemindar, dated in 1176, stated to have been lost in some disturbances that had taken place, and confirming the lands to Moohummud Tukee, his right having been established to the satisfaction of the zemindar's widow, and of her son Rooder Ram Chowdry. The defendants, on the other hand, produced a *sunnud* for the same lands, purporting to have been granted in 1176 by the same Rusik Ram, to Ali Nukee. But this last instrument, when produced in a former suit brought by the zemindar (Rooder Ram) against Ali Nukee, the possessor of the lands, to recover them as a part of his zemindarry, had been strongly suspected to be a forgery, by the Provincial Court of Moorshedabad, and the Sudder Dewanny Adawlut, although the cause was given against the zemindar, on another ground, viz. his admission that the *sunnud* of 1186 was granted with his concurrence to Moohummud Tukee, Ali Nukee's father: in the present case, therefore, the Zillah Judge rejected the *sunnud* in Ali Nukee's name, and considered the right and title to the lands to have been vested in Moohummud Tukee under the *sunnud* in his favour, now produced by his widow the plaintiff. And as Moohummud Tukee appeared to have disinherited his son Ali Nukee, and to have settled the lands on the plaintiff, by the deed of gift and trust, the Zillah Judge considered the plaintiff to have been wrongfully kept out of possession, and to be entitled to recover. Judgment was passed in her favour accordingly in the Zillah Court, with costs against the defendants, and with an order for their accounting to the plaintiff for the mesne profits which had accrued since the death of her husband, after deducting the public assessment and the expences of the mosque.

On appeal by the defendants from the above decision to the Provincial Court of Moorshedabad, that Court did not concur in it. From a *soorut hal*, or written declaration, under the signature of Moohummud Tukee, as well as some other papers, it appeared evident to the Provincial Court that the lands in question were not acquired by Moohummud Tukee, but were originally the property of Abdul Subhan, the maternal grandfather of Ali Nukee, having

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ate Khanum, v.
Muhammad Kool-
soom Khanum, and
Mirza
Mehdee.** been granted to him for the expense of clearing them, on a tenure termed *jungleboory*; and the Court considered that Moohummud Tukee, who appeared to have got possession of them some years after the death of the acquirer, but not as the regular heir, or under any proper title, could have had no power to alienate them from the rightful heir of Abdul Subhan. Even supposing his power to alienate the lands, the Court was of opinion that the deed of gift and trust, by which he settled them on his wife Hyatee Khanum, was void, from the terms of its title being at variance with each other, as well as from its vesting the trusteeship in a woman while a male heir was in existence: and the Court also held, that possession on the part of the trustee, which in the present case did not appear in evidence, was necessary to the validity of the deed. And as the Court considered the lands to have been the exclusive hereditary right of Ali Nukee, and that his right could not have been affected by the deed executed to the claimant, the decree passed in her favour by the Zillah Judge was reversed, and it was decreed, that the defendants should retain possession, as the heirs of Ali Nukee. The costs in the Zillah, and also in the Provincial Court, were made payable by the claimant.

An appeal from the above decision having been brought by the claimant to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), it appeared to the Court, with respect to the facts of the case, that the lands were originally the property of Abdul Subhan; that, after his death, they were attached by the zemindar of the pergunnah, until Moohummud Tukee, the husband of the appellant, obtained a *sunnud* for them from the zemindar, which, *sunnud*, however, appeared to the Court, to be no more than a *sunnud* of confirmation in his favour, as the supposed successor of Abdul Subhan; and that, holding them under this *sunnud*, he executed the deed of gift and trust in favour of his wife; but of her having had actual possession of them as trustee under the deed, proof was not adduced. In order to determine the points of Moohummudan law connected with the case, the Court referred the papers and proceedings to its law officers, and proposed the following question for their opinion: Moohummud Tukee, the husband of the appellant, having, in the year 1186, obtained possession of the lands in dispute, under a *sunnud* or grant from the zemindar of the district, apparently confirming them to him as having been the property of his father-in-law Abdul Subhan; and Moohummud Tukee having while in possession under the above grant, made an endowment of the lands for the service of a mosque, and conferred the trusteeship by the "deed of gift and trust," (or rather assignment and trust) on his wife the appellant, who however does not appear to have ever had actual possession as trustee, under the deed, during the endower's life; and, on the decease of the endower, Ali Nukee, the maternal grandson of the original proprietor, having obtained possession of the lands, which, when he also died, were taken by his heirs the respondents; and the appellant having laid claim to them in the present suit, under the deed of assignment and trust above stated; under these circumstances, 1st, is the deed of assignment and trust, which, besides the alleged inconsistency of its title, assigns the trusteeship to a female, valid as a deed of

trust? 2nd, was Moohummud Tukee at liberty to make an endowment of the whole of the lands, on the strength of the *sunnud* he had obtained for holding them, or was he only at liberty to assign to pious uses so much of them, as legally fell to his share at the death of his wife Misree Khanum, the daughter of Abdul Subhan, in the event of their being considered the estate of Abdul Subhan, divisible among the heirs of that person? 3rd, should Moohummud Tukee have been at liberty to assign to pious uses such share, only, of the lands, will the deed, by which he assigned the whole of them remain valid for the assignment and trusteeship of the part to which he had a legal title? The law officers, in answer to this reference, gave an opinion as follows: The lands appearing to have been the estate of Abdul Subhan, after the legal division of them among his heirs, and the successors of those heirs, in the manner hereafter specified, the whole at length vest in two persons, namely, Moohummud Tukee and Ali Nukee, 11 shares out of 16 falling to Moohummud Tukee, and the remaining five to Ali Nukee. The deed by which the estate was assigned in trust for pious uses, by Moohummud Tukee, is valid, as far as relates to its form; and it is legal for a female to be trustee according to all the authorities of the law. Moohummud Tukee, however, in assigning the whole of the estate, made an illegal assignment of that part of it which was the share of Ali Nukee; and hence, according to the doctrine of Imam Moohummud, the assignment of that part also, which was the personal share of the endower, is void, as that share was at the time undefined; but according to the doctrine of Aboo Yoosuf, with whom the whole series of *Futawa* or expositions of the law, coincide on this point, the endowment of so much of the estate, as was the legal share of the endower, is valid. The Sudder Dewanny Adawlut, after considering the opinion of their law officers, determined that the deed by which the lands were assigned, and the trusteeship vested in the appellant, was good and valid for the 11 ana share of the estate of Abdul Subhan, to which the late Moohummud Tukee was legally entitled; and that his widow, the appellant, should have possession of that share, as the appointed trustee. Final judgment was accordingly given by the Sudder Dewanny Adawlut, amending the decree passed in favour of the respondents by the Provincial Court, with an order for the immediate partition of the lands, viz. 11 anas to be given into possession of the appellant as trustee of the religious establishment, and 5 anas to remain with the respondents, independent of that establishment, as the share of Abdul Subhan's estate, to which Ali Nukee was entitled, and to which, on the death of Ali Nukee, the respondents had the right to succeed. The costs, in each of the three Courts were directed to be paid, in equal shares, by the respective parties. (a)

(a) The partition of the estate of Abdul Subhan among his heirs, and their successors, according to the Moohummudan law of distribution, as specified in the *futwa*, was as follows: Abdul Subhan, at his decease, left a son and two daughters; and the estate being divided into sixteenths, or anas, in the proportion of a double share to the male, 8 anas fell to the son, Mozuffer Hossain, and 4 to each of the daughters. On the son's death, his share was divided between his sisters, so that they then possessed 8 anas each. The

1807.

Nov. 9th.

GUNES GIR, Appellant,
versus

AMRAO GIR, Respondent.

On a claim, THE parties in this case were Hindoos of the *Sunyasi* sect. The action was brought by the late Tejgir in the Zillah Court of Sarun, on the 23rd of February 1802, or 6th of *Phagun* of the *Fuslee* year 1209, to recover from Gunes Gir the lands of Asooke Pursotum and other mouzas, held exempt from revenue for the support of a religious institution, and attached to the office of *Mehunt*, or principal of the establishment. The value of the lands, including property on them, was estimated at 16,000 rupees. The last person who presided over the institution as *mehunt*, with an acknowledged title, was Prem Gir, who died in the year 1195, and of whom the plaintiff was admitted to have been the *chela* or pupil. The plaintiff alleged, that after the late *mehunt's* death, he regularly succeeded to his office as the principal *chela*, and held possession accordingly; and that at the funeral obsequies, which were not regularly performed until the month of *Jeth* 1205, he was confirmed as the successor by the usual public election; notwithstanding which, in the month of *Cheit* 1206, he had been wrongfully dispossessed by the defendant. The defendant denied that the plaintiff had been in possession, as stated by him, or that there had been any constituted *mehunt*, before 1205, since the decease of the last incumbent: He stated, that he (the defendant) was the legal successor; that at the time of the *mehunt's* death, he was absent at Nepal, but returning from thence after a lapse of ten years, convened an assembly of the sect, in *Jeth* 1205, to perform the obsequies of Tejgir, and was then elected his successor, and entered on the office. The principal evidence adduced by the plaintiff was an *ikrarnamēh*, or written engagement, purporting to have been executed by the defendant, acknowledging the title of the plaintiff as *mehunt*, in pursuance of a regular election, and accepting from him the office of *dewan*, or manager of the revenues. This paper was dated the 22nd of *Jeth* 1205, the day on which the election was stated to have taken place. The defendant affirmed it to be a fabrication; and one witness only on the part of the plaintiff having been adduced in proof of its execution, the Zillah Judge did not consider it established. Witnesses on the part of the defendant deposed to his having convened the assembly of *mehunts*, and others of the sect, who, in 1205, performed the usual funeral obsequies for the last *mehunt*, and that the defendant was the person elected the successor, with the accustomed ceremonies, as the most worthy to preside over the insti-

younger sister, Misree Khanum, left at her death two sons, Ali Nukee and Husun Uskuree, besides her husband Moohummud Tukee; and of her 8 ana share, the sons came in for 3 anas each, and the husband for 2 anas. Next died Janee Khanum, another wife of Moohummud Tukee: of her 8 anas, 4 fell to her husband, and 2 to each of her nephews, Ali Nukee and Husun Uskuree. Thus Ali Nukee's proportion was 5 anas; Husun Uskuree's the same; and Moohummud Tukee's 6 anas; until, on the death of Husun Uskuree without issue, Moohummud Tukee succeeded to his son's 5 anas; which made up his proportion of 11 anas, as stated in the report.

tution. And, although the plaintiff was allowed to be a *chela* 1807.
or pupil, of the late *Mehunt*, it was not admitted by the defendant
that this entitled him to the succession; and a *Mehunt*, applied Gunes Gir,
to on the subject by the Zillah Judge, gave an answer, that the *v. Amrao*
succession might be conferred on any deserving person of the Gir.
order, and was not confined to the adopted pupil of the deceased
incumbent, should he be thought unfit for the office. The Zillah
Judge, considering the defendant to have been duly elected, and
to be entitled to the office of *Mehunt* in preference to the plaintiff,
gave judgment against the latter, with costs.

On appeal by the plaintiff from the above decision to the Provincial Court of Patna, he produced the following documents in proof of his having succeeded to and held possession of the office: 1st, a *purwana* by the collector of the district, dated the 28th of February 1788, prohibiting his officers from collecting certain *rusoom* or cesses on account of the *lakhiraj* lands of Tejgir *Mehunt*. 2nd, writings of various dates by different neighbouring zemindars, mentioning Tejgir as the *Mehunt*. 3rd, a *purwana* by the collector, under date the 6th of January 1801, reciting, that Tejgir appeared to have been regularly elected *Mehunt*, and that the *lakhiraj* lands stood in his name; and directing Gunes Gir not to molest him. Besides these documents, the written acknowledgment of Gunes Gir, admitting the right of Tejgir to the office of *Mehunt*, which the Zillah Judge rejected for want of sufficient evidence, was verified by two more subscribing witnesses; and under this and the other documents above recited, in addition to evidence given by witnesses for the claimant, that he was the person elected at the obsequies, and not the other party, it was considered by the Provincial Court to be proved that he was the proper successor. The decree passed by the Zillah Judge against the claim, was therefore reversed by the Provincial Court, and possession of the endowed lands and office of *Mehunt* adjudged to Tejgir.

On the institution of an appeal by Gunes Gir from the decision of the Provincial Court to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), Tejgir, the respondent, died; and Omrao Gir, stating himself to be the *Khas chela*, or principal pupil, and heir, succeeded him in the defence of the cause. On going into the case, the Court observed, that witnesses on the part of the appellant deposed to his having been elected *Mehunt*, at the obsequies of Premgir, in *Jeth* 1205; and on the other hand, the witnesses of Tejgir, the original respondent, declared him to have been the person appointed; which contradictory accounts appeared to leave the actual election uncertain; but Tejgir, as the *chela* of the deceased *Mehunt*, rested his claim to exclusive succession on that ground, as well as on the alleged election, insisting, that the appellant, as not being a *chela* of the deceased *Mehunt*, was on that account unqualified for the office. On reference to former cases decided by the Court respecting disputed successions to the office of *Mehunt*, it appeared, that the succession had been always adjudged to a *chela* of the last incumbent, but it had not been declared whether or not a person, who was not a *chela*, was necessarily excluded from the office. To determine this point,

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and to ascertain in whom the succession in the present instance was legally vested, it appeared proper to the Court to cause a new election to be made; more especially as the respondent, if he were really the person entitled to succeed, could not be placed in the office by the Court, without being regularly elected. An order was accordingly issued, through the Provincial Court, that the Zillah Judge should convene, on the spot where the religious establishment in question was situated, a *punchayut*, or assembly, of the principal persons of the sect, who should proceed to a new election, and determine, what person was entitled to succeed to the office in question, specifying the ground of such person's right to the succession, particularly if he should not be a *chela* of Premgir, or of Tejgir; and that, previously to the award of the *punchayut* being transmitted to the Sudder Dewanny Adawlut, the opinions of the pundits in the Zillah and Provincial Courts should be taken on its legality and correctness. The award given by the *punchayut* assembled in consequence of this order, after reciting, that Gunes Gir was never elected, though he had intrigued with some persons of the sect, and got possession of the *mut*, or temple, stated, that, according to the usage of the sect, the proper successor to a *Mehunt* is his *Khas chela*, or principal pupil; that, at the obsequies of Premgir, Tejgir, his principal pupil, was elected his successor; and that Omrao Gir, the principal pupil of Tejgir, was the person now entitled to the office, and had been elected accordingly. The pundits of the Zillah and Provincial Courts certified the legality of this award; and the pundits of the Sudder Dewanny Adawlut having been also referred to, reported, that "by the law of the *Sunyasi* sect, a *gooroo*, or spiritual teacher, must be succeeded in his rights and possessions by his *chela* or adopted pupil." In conformity with the award of the *punchayut*, and the opinions of the law officers of the respective Courts, the Sudder Dewanny Adawlut determined, that the appellant had no title to be *Mehunt* of the establishment in question; that, on the decease of the *Mehunt* Premgir, Tejgir (the original claimant) was his legal successor, as being his pupil, duly elected at his obsequies; and that, on the death of the latter, the present respondent, on the same ground, was the person entitled to succeed. Final judgment was therefore given, dismissing the appeal, and confirming the decree passed by the Provincial Court, with an order for the respondent's obtaining immediate possession, and for an account being rendered to him of the produce of the endowed lands while in the appellant's possession. (a)

(a) The established usage of the religious order of *Sunyasis*, or *Goswains*, in the election of a successor to the office of *Mehunt*, was stated in the case of *Dhunsing Gir versus Myra Gir*, August 15, 1806. Another case in which the successor was nominated by the *Mehunt* for the time being, and his nomination confirmed by the assembly convened at his funeral obsequies, will be found in the case of *Ramrutun Das versus Bunmalee Das*, Dec. 15, 1806. But the present decision establishes a precedent where no successor has been nominated; and it may be considered the ascertained rule, in such cases, that "the proper successor to a *Mehunt* is his *Khaschela* or principal pupil;" though from the result of former enquiries (in the cases above noticed) the election and installation of the successor by an assembly of *Mehunts*, at the obsequies

ISHURCHUND RAI, and others, Appellants,

versus

RAMCHUND MOKHURJA, Respondent.

THIS was an action brought by Ramchund Mokhurja, in the City Court of Moorshedabad, on the 3d of January 1804, to recover from Ishurchund Rai, and others, alluvial lands to the extent of about 350 beegas; together with mesne profits to the amount of 320 rupees. The plaintiff was talookdar of pergunna Hilalpoor; and the defendants were proprietors of mouzas Maholah, &c. situated to the south and south west of that pergunna. A branch of the river Bhagrutty formerly ran in a winding direction, somewhat resembling the shape of the letter S inverted, through the boundaries of the two estates; but, in consequence of a canal being cut by Government in the Bengal year 1200, through the middle of Hilalpoor, connecting two reaches of the river; and a small stream, running through the other estate, being widened, in 1205, the river had left its former bed, and flowed nearly in a straight direction through the two estates. Three pieces of land, which had been gained from the river by alluvion, at different intervals, partly before and partly after the change that had taken place, were the subject of the present suit. They had been taken possession of by the defendants. The plaintiff claimed them as his right, 1st, from their being contiguous to Hilalpoor; and 2nd, as a compensation for loss he had sustained by the canal having been cut through the middle of his estate. The defendants, on the other hand, alleged their right to retain them as a compensation for losses which they had sustained by the alteration of the river's course, and by former encroachments made by it on their side; particularly by the loss of a *haut*, or village, to which the right of fishery in the old river had been attached. In consequence of the plaintiff having specified his claim to three different portions of land, recovered from the river at different intervals, the Judge of the City Court, conceiving it to be irregular to sue for their recovery in the same action, was of opinion (without entering into the merits of the case) that the present action could not be maintained by the plaintiff, who was in consequence nonsuited with costs.

On appeal by the plaintiff (the talookdar of Hilalpoor,) to the Provincial Court of Moorshedabad, that Court overruled the opinion of the City Judge, and (instead of referring it back, which would have been the regular course) proceeded to try the cause. An *aumeen*, or native commissioner, having been deputed to the spot by the Court, to ascertain the exact situation of the lands in dispute, it appeared from his report, that they were all adjoined to Hilalpoor, and had been formed by gradual alluvion. The Provincial Court in consequence held, that the whole of the lands claimed, as having been gradually annexed by alluvion to the

of the deceased *Mehunt*, appears to be in all cases indispensable, and conclusive. The exposition of the law of the *Sungari* sect, given by the pundits in this case, further declares, that a *gooroo*, or spiritual teacher, (who, being restricted from marriage, can leave no legitimate children) must be succeeded in his rights and possessions by his *chela*, or adopted pupil.

1807. **Ishur Chund Rai, and others, v. Ram-chund Mokharja.** claimant's talook of Hilalpoor, were the property of the claimant; and, to preclude further dispute between the parties, the Court at the same time pronounced that the claimant was also entitled to certain parts of the channel of the old river, in compensation for the loss he had sustained by the canal which was cut through his estate; and that the proprietors of Mahola had a right to the fishery of the new channel in lieu of that which they had possessed in the old one. Judgment was given accordingly by the Provincial Court, including these particulars in their decree; with an order at the same time to the City Judge, to ascertain the sum realized by the proprietors of Mahola while in possession of the adjudged lands, and to cause the same to be refunded. The proprietors of Mahola were also made responsible for the costs in both the City and Provincial Courts.

On a special appeal being moved for by the proprietors of Mahola, from the decision of the Provincial Court to the Sudder Dewanny Adawlut, this Court thought proper to admit it, in consideration of the appellants having represented, that under that decree, the claimant had wrongfully obtained possession of the whole deserted bed of the river, including a part contiguous to the appellant's estate, which they claimed as clearly their right. The Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), on going into the case, pronounced the respondent evidently entitled to the alluvial lands annexed to his estate, on the principle stated by the Provincial Court. With respect to the old bed of the river, the Court considered, that, each party having sustained a loss from the excavation of the new channel, they were each entitled to portions of the deserted bed, viz. the respondent to that part of it contiguous to Hilalpoor, to the eastward of the new channel; and the appellants to that part of it contiguous to Mahola, to the westward of the new channel; in addition to the right of fishery reserved to the latter by the Provincial Court. The decree of the Provincial Court was therefore amended accordingly; and the costs in each of the Courts were made payable by the parties respectively.

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GOURISHUNKUR, and another,
 Dec. 18th. (Heirs of BHUWANIPERSHAD, *Canvongo*), Appellants,
versus
BEIJNATH, Canvongo, Respondent.

A written engagement of the defendant to the plaintiff (his uncle), which had been the ground of THIS was an action brought by the late Bhuwanipershad, in the Zillah Court of Chittagong, on the 23d of August 1800, to recover from Beijnath 55 *doons* of *dewuttur* land, situated in mouzas Pudwa, &c. together with the sum of 7,902 rupees, as mesne profits during eight years. The plaintiff was the paternal uncle of the defendant. Disputes, it appeared, had taken place between them, after the death of the defendant's father, about their respective shares of joint property, hereditary and acquired;

and they at length determined to settle their differences by a partition. On the 15th of February 1791, the following engagement was executed to the plaintiff by the defendant; "We have divided my father's share (of property) and yours. As your acquisitions are the greater, I have allotted to you, and your heirs, 25 *doons* of *dewuttur* land out of my father's share. Should the *dewuttur* lands be short of the quantity, I will make up the deficiency from others." A few days after the above, viz. on the 21st of February, the following counterpart engagement was executed to the defendant by the sons of the plaintiff; "We have settled the partition of the property: 55 *doons* of *dewuttur* lands, from your father's share, are made over to us by your engagement. We have compromised the claim instituted against you, and no claim remains on either side. The actual partition of the landed property shall take place within a year; and the movables shall be divided within six months, from the present date." The plaintiff stated, that, in pursuance of the engagement, he had been for a short time in possession of the quantity of land specified, under a *purwana* from Mr. Bird, at that time collector of the district, dated the 12th of May 1791; that the defendant, however, shortly afterwards turned him out; and that he now sued to be reinstated, resting his right on the defendant's engagement abovementioned. The defendant pleaded, that his engagement to the plaintiff, for the allotment of the *dewuttur* lands, rested on the condition of his obtaining a partition of the joint property within the time specified, which the plaintiff had evaded; and that, as no partition had been made, he was not bound by the engagement. The defendant further pleaded, that the *purwana*, under which the plaintiff had obtained possession, was unfairly procured, by collusion with the collector's *dewan*. This *purwana*, as produced in the Zillah Court, bearing the signature of the collector, and dated the 12th of May 1768, ran thus; "Whereas Beijnath (the defendant) has given 55 *doons* of *dewuttur* land to his uncle Bhuwanipershad (the plaintiff), but the *dewuttur* lands belonging to his share are insufficient, and the quantity has been completed out of other lands, therefore, the gift having been consented to and approved, let the donee have possession." The defendant however produced a copy of this *purwana*, with a certificate on the back of it by Mr. Bird, dated in January 1796, after he had left the office of collector, stating, that if such a *purwana* had been issued under his signature, the signature must have been obtained from him by surprise, as he was aware that the engagement of Beijnath was conditional. The Zillah Judge attributed no authority to this certificate, on the ground of its appearing to him that the *purwana* was more likely to be correct, as having been issued while Mr. Bird held the office of collector, whereas the latter was an extra official act, and written from memory after an interval of years. With respect to the defendant's engagement, the Zillah Judge observed, that there was no reserve of its being void unless the partition were completed; and as it appeared to him that it was unconditional, and that the plaintiff, by virtue of the allotment contained in it, was entitled to the quantity of land specified; judgment was given in his favour in the Zillah Court, for recovering

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the plaintiff's with-
drawing a
law suit
against the
defendant,
and which
contained
an allot-
ment of
dewuttur
lands, to
the plain-
tiff, on an
implied
condition,
viz. the
partition of
a joint pro-
perty with-
in a stated
period,
upheld by
the Sudder
Dewanny
Adawlut,
on the cir-
cumstances
of the case,
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condition
was as yet
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ed; and
judgment
passed,
providing,
that the
plaintiff
might ob-
tain the
lands, on
the parti-
tion being
carried into
effect.

1807. it, with an account of the mesne profits, and costs against the defendant.

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kur, and
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The Provincial Court of Dacca, on appeal to them by the defendant from the above decision, did not concur in it. From its appearing that both the agreements, immediately on their execution, were placed in deposit in the hands of a person named by the Collector, the Court inferred that a stipulation must have been annexed to them; which opinion was considered to be corroborated by the certificate of the late Collector, stating such to have been the case; as well as by the fact of the claimant, though dispossessed, as stated by him, after having obtained, for a short time, the specified quantity of lands, remaining silent under such dispossession for a period of several years until the present suit was instituted. Besides, from the engagements themselves, there appeared to the Provincial Court sufficient reason to infer, that the partition of the joint property was the condition on which the gift was made. It was therefore considered that the engagement of Beijnath rested on this condition; and as the condition, performable within a year, had not been fulfilled by the claimant, it was held that the engagement had become void, and that he had no right to recover under it. The decision passed in the Zillah Court in favour of the claim was therefore reversed by the Provincial Court; and both parties were left to pay their own costs. It was at the same time intimated to the claimant, that if there was any claim which he had suspended in consequence of the engagement, on the ground of greater acquisitions, or of being entitled to a greater share of the property, he was at liberty to renew it in a separate action, notwithstanding the lapse of time.

The heirs of the original claimant having succeeded to him, and appealed from the above decision to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), this Court, on a consideration of the case, concurred with the Provincial Court of Dacca, with respect to the engagement of the respondent having been conditional, as inferrible from the tenor of it, and from the instrument having been left in deposit; and had no doubt that the principal condition was such as connected the allotment of the specified land with a stipulation for an actual division of property. The Court observed, however, that there appeared to have been another condition, namely, the compromise of a claim made by the appellants, and their withdrawing a suit they had preferred; which condition they had fulfilled. The condition of dividing the property had certainly not been fulfilled by them, as yet; but there was no provision in either of the engagements that the gift should become void in case of the partition not being completed within the period mentioned; and the Court did not consider the limitation of time to be of the essence of the engagement; more especially as it did not appear that the respondent sustained any greater inconvenience from the postponement of the partition, than the appellants from being kept out of possession of the lands stipulated to be given up to them; and it was not clear that the cause of delay was to be attributed to one party more than to the other. The Court therefore held, that the engagement of the respondent was not void in consequence of the condition annexed to it not.

having hitherto been performed by the appellants, though their right to possession of the lands specified in it could not be actual and complete before the performance of the condition should have taken place; and it was pronounced, that whenever the condition of dividing the property should be carried into effect, the appellants would be entitled to receive possession of the lands which the respondent had agreed to allot to them, but without any account of mesne profits. Final judgment was given accordingly by the Sudder Dewanny Adawlut, amending the decree of the Provincial Court; and the costs of each of the Courts were made payable by the parties in equal shares. At the same time, it was thought proper by the Court to signify to the parties, that the transfer of *dewuttur* lands, as specified in the respondent's agreement, could only be carried into effect as far as was consistent with the regulations, and that, in case of there not being the quantity specified, actually and duly held as *dewuttur* by the respondent's father, the deficiency could not be supplied from other lands, responsible for the public revenue.

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PUTABNARAEN and RAJCHUNDER, Appellants,
versus
OPINDURNARAEN and MUSSUMMAUT BHUWANI
DASEA, Respondents.

1808.

Jan. 15th.

THE following is the sketch of the family in this case:

JUGGUT JEWUN died leaving four sons.
The estate was held joint and undivided till 1187, Bengal year, when the following partition took place;

9 anas to		7 anas to	
1st Son, his heirs are defendants, who have possession of and claim the whole 9 ana share.	2nd Son, his heirs are plaintiffs, who claim half of the 9 ana share or 4½ anas.	3rd Son, The 7 ana share was divided among the heirs of 3rd and 4th son in the proportion of 3½ anas to the heirs of each.	4th Son,

Decreed by Sudder Dewanny Adawlut.
To Defendants 5½ anas, the share of the elder brother. To Plaintiffs 3½ anas, the share of the younger brother.

On a claim by A and B, against their relations C and D, for possession of a share of an undivided estate, it appearing that, at the demise of their ancestor, several years since, the claimants were heirs to 3½ anas; that they had all along held lands ap- pertaining to the estate, for their ex- pences; and that C and D, who managed the estate,

THIS action was brought by Opindurnaraen and Bhuwani Dasea, in the Zillah Court of Mymensing, on the 6th of May 1802, or 18th of *Bysakh* of the Bengal year 1209, to recover from Putabnaraen and Rajchunder on the ground of hereditary right, a 4½ ana share, forming part of a 9 ana division, of the zemindary of *pergunnah Sheerpore*. The annual produce of the share claimed, was estimated at 10,000 rupees. The *pergunnah Sheerpore* had been formerly the zemindary of Juggut Jewun, the ancestor of the parties, who died leaving four sons. It was stated in the plaint,

1808.

had admitted the right of A and B, to share, within six years before the institution of the suit; a plea of lapse of time, set up by C and D, to bar the claim, not admitted; and judgment passed in favour of the claimants, for possession of the share to which, as heirs, they were entitled.

that in the year 1187, before which the whole estate had been held joint and undivided, a partition of it took place, and 9 anas were allotted to the heirs of the first and second sons, and 7 anas to those of the 3rd and 4th; that the former division was entrusted to the management of one of the sharers, named Soorujnaraen; and on his decease devolved to his son Kerutnaraen, with consent of the sharers in the 9 ana division; and afterwards came into the hands of the two defendants, the heirs of the eldest son; that the plaintiffs, in lieu of the specific profits of their shares, as had been customary with other sharers had received all along the produce of certain lands appertaining to the estate; that the 7 ana division had been parted among the persons entitled to share in it; and that the defendants, on the requisition of the plaintiffs, wrongfully evaded a partition of the 9 ana division, of which the plaintiffs claimed to be put into possession of a moiety as their right of inheritance. The defendants denied the right of the plaintiffs to any share in the estate, stating, that they had always received a maintenance, only, and never held possession of any share; and that, after the length of time which had elapsed, their claim of inheritance was barred by the rule of limitation laid down in regulation 3, 1793. The plaintiffs, in order to show that their right to share in the 9 ana division had been admitted, produced two written engagements, the first dated in *Katic* 1188, and signed by the defendant Purtabnaraen, as one of the managers, admitting the right of the plaintiffs to share in the estate, and stating, that if they should require a division, they were to obtain $3\frac{1}{2}$ anas. At the date of this engagement the right to the remaining one ana was stated by the plaintiffs to have been under discussion. The second was dated the 9th of *Jeth* 1203, and signed by both the defendants, agreeing to give the plaintiffs 2 anas, as their share. It did not appear to the Zillah Judge that the plaintiffs, who had never held any specific share of the estate, could, after the time that had elapsed, maintain any hereditary claim, independent of the above engagements. The first engagement, for $3\frac{1}{2}$ anas, was denied by the defendants; and was not considered admissible by the Zillah Judge, from its bearing only the signature of one manager, as well as from its having been rejected by the Court when produced on a former occasion. The second engagement in favour of the plaintiffs, for 2 anas, was admitted by the defendants; but they produced, on their part, an engagement dated three days after it, purporting to have been executed as a counterpart of it by the plaintiffs, consenting to receive 2 anas as their portion, and also stipulating, that if they should sell, or otherwise dispose of any part of it, the engagement by which the defendants promised them 2 anas, should be of no effect. As it appeared, in the course of the proceedings, that the plaintiffs had agreed to transfer a one ana share to a person named Brijnath, the Zillah Judge considered that the engagement of the defendants was void, under the condition of the counterpart-engagement of plaintiffs; that no part of their claim to share in the estate could be maintained; and that they were only entitled to receive a maintenance from it. Judgment was accordingly given against them in the Zillah Court.

On appeal by the plaintiffs from the above decision to the Pro-

vincial Court of Dacca, that Court upheld the engagement for giving 2 anas, as the alleged counterpart engagement, containing the condition of its being void in the event of any part of the share being disposed of, was not admitted by the claimants, and was considered by the Court a suspicious document; and also as no actual transfer appeared to have been made, which could incur the stated penalty, even if the counterpart engagement were admitted. The Provincial Court gave judgment in favour of the claimants, for a 2 ana share of the 9 ana division, with costs against Purtabnaraen and Rajchunder. 1808.
Pertabnaraen and Rajchunder, v. Opindurnaraen and Mussummaut Bhuanani Dacca.

On appeal by these persons from the above decision to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), it was observed that both parties objected to the engagement of *Jeth* 1203, for assigning 2 anas to the respondents, and were not willing to rest their case upon it, the appellants, on the one hand, alleging, that the respondents, from never having possessed any share, were not entitled to claim any; and the respondents demanding the whole $4\frac{1}{2}$ anas, which they originally claimed, by hereditary right. The engagement, therefore, was not considered by the Court of any avail towards deciding the suit; except in so far as it was held to afford sufficient proof, that, at the period of its date, the appellants admitted the right of the respondents, as coheirs, to share in the 9 ana estate. It appeared from the proceedings, that in 1177, a division of the zemindary of Sheerpore, formerly possessed by Juggut Jewun, had been made between his sons, or their representatives; and that, 2 anas above the portion of the others being allowed to the share of the eldest son, 9 anas were allotted to the 1st and 2nd sons, and 7 anas to the 3d and 4th sons, or their heirs. The 7 ana division had been parted among the persons entitled to share in it; and the Court saw no cause why the same partition should not take place, if required, with respect to the 9 ana division. The respondents appeared to have all along held lands belonging to the estate, not, in the opinion of the Court, as a maintenance, unconnected with proprietary right, but evidently on the ground of their being sharers, and in lieu of the specific profits of their shares, (as is not unfrequently the case with part of the sharers in an undivided family inheritance): and the Court held, that the plea of lapse of time, set up by the appellants, who were only considered to have held the general control of the 9 ana division as managers of a joint estate, could not affect the claim of the respondents to actual possession of that part of it, to which they had an hereditary title. It was ascertained that the respondents were the heirs of the 2nd son of Juggut Jewun; and, as such, they were entitled to $3\frac{1}{2}$ anas, the allotment of the heirs of each of the younger sons; $5\frac{1}{2}$ anas having been left, by general consent, to those of the eldest son. The decree of the Provincial Court was accordingly amended by the Sudder Dewanny Adawlut, and final judgment given in favour of the respondents, for $3\frac{1}{2}$ anas of the 9 ana division, in part of their claim; with mesne profits since the date of the action, deducting the produce of any talook or other lands held by the respondents; and costs, in each of the Courts, proportionate to the part of their claim adjudged in their favour. It was further

1808. provided, that if the respondents should desire the separation of the share adjudged to them from the rest of the 9 ana division, they should apply in the usual form to the collector of the district, who would carry it into effect, as prescribed by the regulations. (a)

1808. GOPEENATH RAI and RUGHODEO, Appellants,

versus

Feb. 5th. RAMCHUNDER TURKLUNKAR, Respondent.

A, holding the right of fishery in a branch of the river, having taken possession of a *jheel* formed by overflows on the adjacent lands of B, declared, on the suit of B, to have no legal right or interest in the *jheel*, it not being connected with the channel of the river, which had not altered.

THIS was an action brought by Gopeenath and Rughoodeo, in the Zillah Court of Burdwan, on the 9th of September 1802, or 25th of *Bhadon* of the Bengal year 1209, to recover from Ramchunder Turklunkar, possession of a lake called '*jheel Bhugolea*,' as their hereditary property. The annual produce was stated at 205 rupees. The plaintiffs were talookdars of mouzas Soudagurpore, &c. to the north of which was the course of a branch of the river Ganges; and through a part of their talook, immediately contiguous to the river, the *jheel* in question had been formed, in a semi-circular shape. The defendant held, under the Rajah of Burdwan, proprietor of the opposite bank, a grant of the right of fishery in the adjacent reach of the river. The *jheel* having been formed by overflows of the river, the defendant, after various disputes with the plaintiffs, had taken possession of it, as having become part of the reach to which his grant extended. The plaintiffs sued to recover it as part of their talook. An *aumeen* was deputed from the Zillah Court, with the consent of the parties, to make a local investigation, and as it appeared to the Zillah Judge, according to his report, that the *jheel* did not form any part of the river's channel, and clearly belonged to the estate of the plaintiffs, judgment, was passed in favour of the plaintiffs, in the Zillah Court.

The Provincial Court of Calcutta, on appeal to them by the defendant, reversed the above decree, on the ground of its appearing to them that the right of fishery, under the grant, must follow the river, whatever course it should take; and that as the river had overflowed the lands of the *jheel* in question, and part of the *jheel* appeared to communicate with the river, the defendant was entitled to the right of fishery in it, under his grant.

A special appeal by the plaintiffs, from the above decision, was admitted by the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle.) This Court observed, that, although the *jheel* had been formed by the overflowing of the river, it could not be considered as actually connected with the river, since it appeared, from the *aumeen's* report, that two channels, by which it com-

(a) The principle on which the decision in this case was partly founded, viz. that the possession of certain lands, appertaining to a joint estate, in lieu of an annual dividend of the profits of the estate, left under the management of one or more sharers, is sufficient to maintain a right of partition in the joint estate, when required, was admitted by the Court of Sudder Dewanny Adawlut, with the concurrence of their law officers, in the cause of Ranee Bhuwani Dibeh, and another, appellants, *versus* Ranee Soorjmunee, respondent, May 12, 1806.

municated with the river, were only open at particular intervals, 1808. when the water was at the highest; and that no alteration had taken place in the river's channel. As, therefore, the *jheel* in dispute had been formed, without the channel of the river being changed, on the lands of the appellants, to which the grantor of the right of fishery to the respondent, had no title, the Sudder Dewanny Adawlut considered the respondent to have no just claim to possession of the *jheel*. The Court accordingly reversed the judgment of the Provincial Court, and affirmed the decree passed by the Zillah Judge for possession being recovered by the appellants; with costs, in each of the Courts, against the respondent; who was further directed to account for the mesne profits since the commencement of the year in which the suit was preferred. (a)

Gopeenath
Rai and
Rughoo-
deo, v.
Ranchun-
dee Turk-
lunkar.

BABOO DEOKINUNDUN SING, Appellant,

1808.

versus

JOBRAJ RAI, and others, Respondents.

Feb. 19th.

THIS was an action brought by Jobraj Rai and others, in the Zillah Court of Jaunpore, on the 12th of March 1804, or 16th of *Cheit* of the *Fuslee* year 1211, to recover from Deokinundun Sing the sum of 1,274 rupees. The defendant was tehsildar, or native collector of pergunnah Secunderpore; and the plaintiffs were zemindars of certain lands in that pergunnah, the revenue of which they paid through the defendant. The *jumma*, or yearly assessment, specified in their engagements, was 1,801 *gohurshahi* rupees. As the accounts of the pergunnah, however, had been always kept in *tirsoolee* rupees, it was customary to reduce the amount demanded from the plaintiffs into an equal value of that coin; and as the plaintiffs actually made their payments to the defendant in Benares *siccas*, a *batta*, or exchange, of 6-4 *per cent* had been allowed in their favour by the defendant, as the difference of value between *sicca* and *tirsoolee* rupees. The plaintiffs, in bringing the present action, alleged, that the rate of exchange which ought to have been allowed them, and which the defendant himself obtained on his payments into the treasury, was 9-6 *per cent*, being an excess of 3-2 *per cent* above what they had obtained from the defendant. Of the amount demanded therefore, 450 rupees were claimed by the plaintiffs, as unjustly withheld from them by the defendant, in not allowing them an exchange of 9-6 *per cent* on the payments made by them during a period of eight years, ending with 1210 *Fuslee*; and the remaining 824 rupees were claimed by the plaintiffs as the amount of *nuzrs*, or presents, illegally exacted from them by the defendant, during the several years of the same period. It was set forth in the answer of the defendant, 1st, that the exchange of 6-4 *per cent*, which he

Claim by
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part, viz-
for *nuzrs*
illegally
exacted,
by the teh-
sildar's
officers,
with his
knowledge
and con-
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Tehsildar
also sub-
jected to a
fine to Go-
vernment
of three
times the
amount so
exacted.

(a) The principle which governed the final decision in this case is, that the general right of fishery in a river, (when not otherwise defined,) is restricted to the channel of the river, and water considered to form part of it: not extending to adjacent lakes or other pieces of water, occasionally supplied by overflows of the river, but not actually connected with the channel of it.

1808. had allowed in favour of the plaintiffs, was the highest to which they were entitled, and was the same that had been allowed on the payments of the other landholders in the pergunnah; 2nd, that the plaintiffs had never once complained on the subject, during the period of eight years to which their claim extended; 3d, that no *nuzrs* and others. had ever been taken by him from the plaintiffs. The exaction of annual *nuzrs* amounting to the sum claimed by the plaintiffs, was proved to have been made by the officers of the defendant, with his knowledge and connivance, so that the responsibility for it rested with the defendant. With respect to the difference of exchange between *sicca* and *tirsoolee* rupees, it appearing in evidence, that 9-6 *per cent* was the rate allowed to the defendant, it was the opinion of the Zillah Judge that the same rate should have been allowed by the defendant in favour of the plaintiffs, on their annual payments of revenue during the period stated in the plaint; and that the difference, between the rate which the plaintiffs had been allowed, and that to which they were entitled, was recoverable, as well as the amount of the *nuzrs*, from Deokinundun, the defendant. Judgment was accordingly passed, in the Zillah Court, for the plaintiffs recovering the amount claimed, from the defendant, and for the defendant's paying a fine to Government of three times the amount, as a penalty for the illegal exaction.

On appeal by the defendant from the above decision to the Provincial Court of Benares, that Court concurred in it, and dismissed the appeal, with costs, and with interest on the amount adjudged to the plaintiffs, from the date of the Zillah decree.

A further appeal was preferred to the Sudder Dewanny Adawlut by the defendant, who still alleged that the exchange of 6-4 *per cent*, allowed by him to the respondents, was the customary rate allowed to other landholders; and, to prove this, produced before the Sudder Dewanny Adawlut a copy of a *purwana*, bearing date the 18th of June 1795, addressed by the resident at Benares to the person who was at that time tehsildar of Secunderpore, authorizing him to give credit to the landholders, for the difference between *sicca* and *tirsoolee* rupees, according to the former established usage, which it stated to be 6-4 *per cent*. On considering the question relative to the rate of exchange, the Court observed, that, as the engagements of the respondents stipulated for *gohurshahi* rupees, and the respondents, who did not make their payments in that coin, made them of their own accord in *sicca* rupees, during the whole period in question, at an exchange of 6-4 *per cent*, without offering an objection, or complaining to the Collector or any other authority respecting the rate of exchange allowed them, it must be presumed that they then admitted that rate to be equitable and proper; independently of which, no evidence was adduced by them to prove a right to 9-6 *per cent*, the rate which they now demanded; and, according to the *purwana* of the Collector of Benares (corroborated by other corresponding documents), it appeared to the Sudder Dewanny Adawlut that 6-4 *per cent*, the rate which they had been allowed, was actually the proper and established rate of exchange between *sicca* and *tirsoolee* rupees in transactions between the tehsildars and landholders. Therefore, although the appellant, on making his remittances to the public

treasury, should have obtained (as it appeared he had done) a *batta* of 9-6 *per cent.* on his payments in *sicca* rupees, thereby subjecting himself, in conformity with his engagement to Government, and in pursuance of the 27th section of regulation 2, 1795, to an action on the part of Government for the recovery of the excess, it was held by the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), that the respondents could not maintain that part of their claim against the appellant, which related to the rate of exchange. With respect, however, to the amount claimed by the respondents, for *nuzrs* taken from them by the appellant, the Sudder Dewanny Adawlut concurred with the Zillah and Provincial Courts in considering the illegal exaction established against the appellant, as having been made by his officers, with his knowledge and connivance. The decrees of the Zillah and Provincial Courts were accordingly amended by the Sudder Dewanny Adawlut, and judgment given for the recovery of 824 rupees by the respondents, as the amount of *nuzrs* exacted from them by the appellant; with interest from the date of the Zillah decree. It was also finally ordered, that the appellant should pay a fine to Government of three times the sum thus illegally exacted. The remainder of the claim of the respondents, relating to the rate of exchange, was dismissed; and the costs, in each of the Courts, made payable by the parties respectively. (a)

1808.

Baboo
Deokinun-
dan Sing,
v. Jobraj
Rai, and
others.

SUMBHOONATH, (Brother and Heir of SHEONATH
PURAMANIC), Appellant,
versus

1808.

April 12th.

MUSSUMMAUT ALUKMUNEE, Respondent.

THIS was an action brought by the late Sheonath Puramanic, in the Zillah Court of Beerbhoom, on the 26th of August 1802, or 10th *Bhadon* of the Bengal year 1209, to recover from Mussummaut Alukmunee the talook of Kugas, situated in the pergunnah Sabik Mooresur, and consisting of about 17 mouzas, assessed at the sum of 16,199 rupees. The plaintiff was proprietor of a zemindary in the district, and had also a *kothee* or banking house in Calcutta, the business of which appeared to have been principally managed by Sridhur, late husband of the defendant. The mouzas in dispute formed a lot lately sold at public auction in Calcutta, in consequence of arrears of revenue due from the former proprietor; and the plaintiff sued for them as having been purchased on his account, by the late Sridhur, and now fraudulently withheld from him. The particulars set forth in the plaint were, that Sridhur was in the plaintiff's service in the Calcutta banking house; that on the plain-

Claim by
A, on B,
for lands
bought at
public sale
by the late
husband of
B, on the
alleged
ground
that he
bought them
as agent
on the part
of A. This
not being
established,
and it
appearing,
on pre-
sumptive
proof, that
the pur-
chase made
by the hus-
band of B
was for
himself,

(a) Proprietors and farmers of land are expressly declared by the regulations (clause 7, section 15, regulation 7, 1799, and a corresponding clause in section 14, regulation 5, 1800, as well as in section 32, regulation 28, 1803,) responsible for illegal exactions by their agents; and the same principle is obviously applicable to the agents of *tehsildars*; especially when the exaction is made with the knowledge and connivance of the latter. In such cases the agent must be presumed to act for his principal; for it is the duty of the principal to restrain his agent from an abuse of the power vested in him.

1808. **Jndgment passed dismissing the claim.** tiff's learning that the lands in question were to be sold at auction in Calcutta, he wrote to Sridhur to purchase them for him, which the latter accordingly did, but as the plaintiff's *mokhtar-nameh*, or power of attorney, had not arrived at the time he bought them, he took out the title deeds, in his own name, drawing the purchase money (3,600 rupees) from the plaintiff's house; that he was then deputed by the plaintiff to manage the purchased lands, and had charge of them accordingly; that, in *Poos* 1208, the plaintiff having reason to suspect his honesty, sent for him and made him execute a written acknowledgment, that the purchase was on the plaintiff's account, a few days after which he died, in possession of the title deeds, which he had obtained on the pretence of their being necessary to settle a dispute respecting Katikgunge (one of the purchased mouzas); and that his wife, the defendant, in concert with others, now resisted the plaintiff's right to possession. The defendant affirmed, that the claim was fraudulent; that her husband, whom she stated to have had a share in the plaintiff's banking house, bought the talook on his own account, and held it as his own: and, on his death-bed, made it over to the defendant. The plaintiff was in possession of a receipt for the purchase money (but in Sridhur's name) signed by the Secretary to the board of revenue; and he produced the written acknowledgment, alluded to in his plaint, purporting to have been executed by Sridhur on the 2nd of *Magh* 1208, and admitting, that the lands were purchased by him on account of the plaintiff, and were the plaintiff's property. The defendant asserted it to be a forgery; but as four persons, whose names were subscribed to it, swore to having witnessed its execution, the Zillah Judge admitted it in evidence, and, considering it to prove that the lands in dispute were purchased on the part of the plaintiff by the late husband of the defendant, and were the plaintiff's property, gave judgment in his favour, without further investigation, with costs against the defendant.

On appeal by the defendant from the above decision to the Provincial Court of Calcutta, on the plea that the evidence to the alleged acknowledgment was false, that Court caused the Zillah Judge to take the evidence of other witnesses named by each of the parties, and, on a consideration of the case, the Senior Judge who sat on the appeal was of opinion, that the zillah decree should be reversed, for the following reasons; 1st, the evidence on the part of the claimant appeared to him unsatisfactory, for reasons hereafter stated; and he thought it clear, that, in a case like the present, when the deeds were in the name of the party on whom the claim was made, nothing short of the most satisfactory proof, produced by the party claiming, could warrant a judgment in his favour. 2nd, there was no proof on the part of the claimant that he deputed Sridhur to purchase the lands in question on his part. 3d, the witnesses for Mussumaut Alukmunee deposed, that her late husband, as *gomashita* of the claimant's house in Calcutta, had a two ana share of the profits, and that he kept in the house his money accruing from these profits, as well as from other separate concerns. Therefore, although it was admitted that the purchase money for the lands was drawn from the house, it did not follow, from this, that the purchase was for the claimant. 4th, it was

proved, that, when Sridhur was dying, the claimant had gone to his house to see him; that Sridhur, in the claimant's presence, delivered to his wife the title deeds of the lands in dispute, saying, that he bequeathed them for the subsistence of her, and his son; that the claimant then made no objection, or pretension that the lands were his property; and further, that, on being asked by Sridhur for the receipt for the purchase money, he gave an evasive answer, "that Sridhur would get well, and he would give it him when he recovered." 5th, witnesses were called by the claimant in support of his statement that the title deeds were delivered to Sridhur in consequence of the stated dispute about Katikgunge; but the persons who deposed to this fact were residents in another part of the country, and were not likely to have witnessed it; and it was proved (in the opinion of the Senior Judge) that the receipt for the purchase money, in the name of Sridhur, which was now in possession of the claimant, and was dated a day or two after the title deeds, was received on his account by the house in Calcutta, after he had himself gone to take possession of the new purchase. 6th, it was ascertained that the written acknowledgment, exhibited by the plaintiffs, was not attested by the *cazee* whose seal was affixed to it, until after the death of Sridhur, and that he was not the *cazee* of the *pergunnah* Moreesur, where the claimant resided (the person who should properly have attested it); and it was deposed by the *cazee* of that *pergunnah*, that he had been applied to, to put his seal to the instrument, but had refused to do it, on the ground of his finding, on enquiry, that Sridhur was deceased, at the time the application was made to him. Under these circumstances, the Senior Judge did not give credit to the acknowledgment, but believed the lands to have been the property of the late Sridhur. The Junior Judge believing the fraud to have been on the part of Sridhur, and not seeing sufficient ground to disbelieve the acknowledgment, was of opinion that the Zillah decree should be affirmed. As the decree of the Provincial Court was not final (so as to bring it within the provision of section 7, regulation 3, 1797,) the zillah decree was reversed, by the casting voice of the Senior Judge (under section 2, regulation 47, 1793), with costs in both Courts against the claimant.

On appeal by the claimant from the above decision to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), this Court, on consideration of the case, concurred in the judgment passed against the claimant. In addition to the reasons given by the Senior Judge of the Provincial Court, the Sudder Dewanny Adawlut observed it was very improbable, that the late Sheonath, a zemindar and banker, should have been so far unaware of the regulations applicable to purchases of land at public sale, as to direct the late Sridhur to purchase the lands in dispute for him, without the regular power which the regulations expressly require; and still more improbable that, after the sale, when he knew that the title deeds and the receipt for the purchase money were in the name of Sridhur, and Sridhur obtained from the collector an *umulnameh*, or order for possession, in his own name, as the purchaser of the lands, he should not have explained

1808. to the collector that the purchase was made on his account, had it really been the case; and although, by accounts of the banking house, produced before the Court, it appeared that the purchase money, drawn by Sridhur, was more than the balance standing in his favour on the books, the Court considered, with reference to the situation of *mokhtar* or manager, which he held at the time, that his title, or that of his heirs, to the purchase of the lands, as on his own account, could not be invalidated on that ground, although he was of course debtor to the house in the sum he had overdrawn. With reference therefore to the whole circumstances in evidence, particularly that all the documents relating to the sale of the lands were in the name of the late Sridhur, and that he appeared to have been in possession till the time of his decease, without there being any proof on the part of the claimant that Sridhur possessed otherwise than as proprietor; the Sudder Dewanny Adawlut concurred with the Senior Judge of the Provincial Court in considering the claim preferred by the appellant's predecessor to be not established. Final judgment was therefore passed, confirming the decree given by the Provincial Court; with costs in each of the Courts payable by the appellant. (a)

OCHUBANUND GOSAEN, Appellant,

versus

1808.

HURINDERNARAEN BHOOP, Respondent.

April 29th. THIS was an action brought by Ochubanund in the Zillah Court of Rungpore, on the 17th of September 1801, or 3rd of *Asin* of the Bengal year 1208, to recover from Hurindernaraen the sum of 23,694 rupees. The defendant was Raja of Cooch Behar and zemindar of Boda, in the Company's territory; and the plaintiff's father, from the beginning of 1190 to the end of 1196, during the minority of the defendant, had been in charge as *mokhtar*, of the defendant's zemindary, in conjunction with one Casinath Lahuree, the defendant's *dewan*. The revenues of the zemindary were then paid through the banking house of Juggut Seet, at Rungpore. On the 5th of *Asin* 1194, or 13th of September 1786, a bond was stated to have been executed by Casinath Lahuree, the *dewan*, in the name of the defendant (who was then a minor), for the sum of 27,920 rupees, purporting to be a balance of revenue due from the defendant's zemindary, and paid from the banking house, on his account, into the Company's treasury. To this bond the name of Surbanund, the plaintiff's father, was subscribed, as security for the payment; and it appeared that the plaintiff had been sued in the Zillah Court under the bond as heir of the surety, by the *gomashita* of the banking house, and that a judgment was obtained against the plaintiff, on the 1st of May 1801, for 21,938 rupees, as balance then due, after deducting

(a) It not being established in this case, that the lands were purchased at the public sale, for Sheonath, in the name of Sridhur, it did not become a question how far the provisions against purchases in fictitious or substituted names, contained in the 3rd clause of section 29, regulation 7, 1799, were applicable.

Claim by A on B, for the amount of a judgment and costs given against A, as security for the amount of a bond purporting to be due from B; which bond however B does not admit. It not appearing that B had notice of the action brought against A as security, the judgment then given held of no effect against B;

receipts. This sum, together with the costs given against the plaintiff in the above suit, formed the amount which the plaintiff now sued to recover, as having paid it in the capacity of heir of the defendant's surety. The defendant affirmed, that the bond and the present claim were fraudulent; that there had never been any failure in his zemindary to make borrowing necessary; that the plaintiff's father was never desired or authorized to become security for any bond; and further, that he had never passed his accounts with the defendant. As it appeared that, after 1196, commissioners had been appointed by Government until the defendant's minority expired, to manage his zemindary, and settle all concerns relating to it; and as it did not appear that any mention of the transaction in question had been made to those commissioners; the Zillah Judge, on this ground, and on its appearing to him, that as more than twelve years had elapsed since the date of the bond, the claim was barred under the rule of limitations, gave judgment, dismissing the plaintiff's claim, with costs.

1808.

and a decree passed dismissing the claim, (though with certain eventual reservation), on defect of proof as to the reality of the debt, and strong appearances of fraud.

On appeal by the plaintiff from the above decision, to the Provincial Court of Moorshedabad, the judges of that Court did not agree in opinion respecting the case, with the exception, however, of its appearing to them all that the lapse of time, objected by the Zillah Judge as a bar to the claim, was not of any effect, as the former action, on the bond, had been brought within twelve years of the date of it. The Senior Judge was of opinion, that the money, as the bond purported, and as witnesses in the former cause appeared to have deposited, had been really advanced for paying the revenue of the defendant's zemindary, and that the debt, as having been contracted for the benefit of the estate, was recoverable from the proprietor. The second and third judges, though not entirely agreeing with each other, were both of opinion, on the whole, that the claim was fraudulent, chiefly grounding their opinions on the extensive influence which the claimant's father possessed, at the time, over the officers of the zemindary, and of the debt, and securityship of the claimant's father, not having been made known to the commissioners; independently of which, the claimant's father having voluntarily become security, without having been called on to do so, under such circumstances afforded room for suspicion. By the majority of voices in the Provincial Court, the decree passed against the claim by the Zillah Judge, was affirmed, with costs payable by the parties respectively.

On a further appeal to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), this Court concurred in considering that the claim could not be admitted. The appellant laid stress on the former judgment obtained on the bond against himself, as heir of his father, the security; but the Court observed, that the former judgment could be of no effect against the respondent, who had not been made a party to the former cause, nor had an opportunity to state his objections to the bond, and on whom it did not appear that any demand had been made, or that any notice had been given to him, before the suit alluded to was instituted: that the relative situations in which the appellant's father, and Casinath, stood at the time the bond bore date, in the entire controul of the estate, combined with the debt not having been

1808.

Ochubannund Go-
saen, v.
Hurinder-
naraen
Bhoop.

mentioned to the commissioners, and with the accounts of the estate, for the time the appellant's father was *mohttar*, not having been yet passed or brought forward, together with the circumstance of judgment having been obtained on the bond, against the security, without the principal being informed of it, afforded strong ground to suspect fraud with respect to the alleged debt; and at all events, as it would be easy, on the appellant's production of the accounts during the period of his father's management, to ascertain whether the money was in reality advanced for the estate, and, if such were really the case, the appellant would be entitled to credit for it, the Court determined, that the claim, as it now stood, was not admissible. Judgment was therefore passed by the Sudder Dewanny Adawlut, dismissing the appeal, with costs.

1808.

May 23d.

MUSSUMMAUT MAHAMAYA DIBEH, Appellant,
versus
GOUREEKAUNT CHOWDRY, Respondent.

Claim by a widow, as heir of her husband, to the moiety of an estate, dismissed, on proof that her husband's brother succeeded, before the dewanny grant, to the whole estate, under a custom by which it always devolved entire to one heir.

THIS was a suit instituted by Mahamaya Dibeh, in the Zillah Court of Purnea, on the 16th of April 1802, or 5th of *Bysakh* of the Bengal year 1209, to recover from Goureekaunt Chowdry, a moiety of the zemindary of pergunnahs Hutinda and Busagaon. The annual produce of the moiety was stated at 18,691 rupees. The plaintiff was the widow of Khurgesur Rai, and claimed the moiety in dispute as her right by succession to him. She stated, that her husband and his brother Dhurneedhur, after succeeding jointly to the estate on the decease of their father, lived in family partnership, on the profits, without dividing the property; that, after the decease of the two brothers, the defendant, who had been adopted by the widow of the elder brother, was made manager of the estate, and that she (the plaintiff) lived jointly with her sister-in-law, until, in 1206, disputes arose, and she demanded possession of the moiety of the estate, which had belonged to her husband, but which the defendant refused to give up; wherefore the plaintiff sued to recover it. The defendant alleged that the estate was the exclusive property of Dhurneedhur, his adoptive father, by inheritance from whom he had succeeded to the whole of it; and that, at all events, from the length of time during which it had been held by his adoptive father and himself, the claim of the plaintiff was barred under the rule of limitation contained in section 14, regulation 3, 1793. The principal evidence for the plaintiff was a letter purporting to have been written to her by Mussummaut Heiratee (widow of Dhurneedhur), admitting the estate to be joint property, and offering her an annuity, on condition that she would not sue for her husband's share. This letter, however, was not admitted by the defendant, who clearly proved, by documents and other evidence, that during the life-time of Kalichurn Rai, former zemindar of the estate, and father of Khurgesur and Dhurneedhur Rai, the former of the sons was for a short time manager of the

estate, but that the management was afterwards transferred to Dhurneedhur Rai, whom the zemindar designed for his successor; that on the zemindar's death, Dhurneedhur succeeded to the estate, which it had been the custom not to divide, and remained until his decease in possession; and was afterwards succeeded by the defendant, who had been adopted by the elder widow of Dhurneedhur, under authority received from her husband to that effect. As more than 45 years had elapsed since the death of Kalichurn; and as the plaintiff did not prove that either she or her husband had since possessed, or preferred any regular claim to, a share of the estate; the Zillah Judge was of opinion that the present claim, independently of not being established, was inadmissible under the rule of limitation pleaded by the defendant. The claim was accordingly dismissed in the Zillah Court; but it was at the same time provided, in conformity with a general maxim of Hindoo law, that the plaintiff, as a member of the family, should receive, as she appeared to have before done, a maintenance from the estate.

On appeal by the plaintiff from this decision to the Provincial Court of Moorsshedabad, that Court concurred in it, and dismissed the appeal.

The Sudder Dewanny Adawlut, on a further appeal by the plaintiff (who still alleged the right of her late husband as a coheir), also concurred in the judgment against the claim. It appeared clearly established by the evidence that the estate had never been divided; that, on the decease of Kalichurn, in 1759, his younger son Dhurneedhur, who had managed the estate for some years before, in consequence of his elder brother, Khurgesur, being disqualified by some intellectual infirmity, retained the management, with the name of the late zemindar still current, till the death of Khurgesur in 1762; and then succeeded to the exclusive possession of the estate, which he kept until his decease in 1777. It then descended to his elder widow; and, three years afterwards, on her adoption of the respondent under express authority from her husband, it devolved to him, in conformity with the Hindoo law. The Court further observed, that the rules contained in regulation 11, 1793, for doing away the custom by which particular estates descended entire to a single heir, have prospective operation only, as provided by that regulation, from the 1st of July 1794, and uphold the validity of successions, which may have actually taken place under the custom alluded to previously to that date. The Court, accordingly, being of opinion that the claim of the appellant against an actual succession, and exclusive possession, obtained not only before the date fixed for the operation of regulation 11, 1793, but before the Company's accession to the dewanny in 1765, could not be maintained, confirmed the decrees of the Zillah and Provincial Courts, and dismissed the appeal.

1808.

Mussum-
mant Ma-
hamaya
Dibeh, v.
Gouree-
kaunt
Chowdry.

1808.

MOOHUMMUD REAZODEEN, Appellant,

versus

June 13th.

AKBUR ALI KHAN, (for himself and his brother ASKUR ALI KHAN) Respondent.

Claim by the proprietors of a jagir, to recover certain lands from a person who asserted a right to hold them under a *mokurreree potta*, at a low rent. On proof that the *potta* was obtained from the agent of the jagirdars, without their authority or knowledge, judgment for setting it aside, and giving possession to the claimants, with mesne profits since the date of the suit.

THIS was an action brought by Akbur Ali Khan against Reazodeen, in the Zillah Court of Tirhoot, on the 4th of March 1799, or 12th of *Phagun* of the *Fuslee* year 1206, to recover possession of the mouza Madhoopore Chitoree, which the defendant asserted a right to hold on a *mokurreree* tenure at a low fixed *jumma* of 101 rupees; and also to recover from the defendant the sum of 946 rupees, as balance of profits realized by him from the lands during illegal possession, from the beginning of the *Fuslee* year 1202 to the date of the action. The plaintiff and his brother were jagirdars of pergunnah Nanpore, in which the mouza in question is situated. It was stated in the plaint, that the whole pergunnah had been farmed to one Burkut Ollah, on a decennial lease, expiring at the end of 1201; that in 1192, when the lease commenced, Aleem Ollah, a person who had been formerly *mokhtar* of the *jagir*, and who had been left resident in the mouza, granted a *mokurreree potta* for it, without the knowledge or authority of the plaintiff, or his brother, but in the names of both of them, to Ashruf Ali, *nazir* of the Civil Court; that the *nazir* found means to obtain possession under the *potta*, and afterwards sold it to the defendant; that the plaintiff and his brother having learnt the circumstance, at the expiration of the decennial lease of their *jagir*, sent their people to make the collections of the mouza, but had only succeeded in obtaining 405 rupees; after deducting which amount from the sum due to them as jagirdars, during the period in question, there remained the sum claimed by them, recoverable from the defendant. The defendant asserted a title to a *mokurreree* tenure of the mouza, alleging that the *mokurreree potta* of 1192, was duly granted by Uskur Ali Khan, the plaintiff's brother; and that the defendant purchased it from the grantee. The defendant exhibited, 1st, a *mokurreree* grant and *potta*, in the name of one Meer Ahmud Ali, dated in 1192, for the mouza Madhoopore Chitoree, to be held at a fixed *jumma* of 101 rupees; 2nd, deeds of *bye-bil-wusu*, or mortgage and conditional sale of the *mokurreree* tenure, to the defendant, for 1,601 rupees, to become absolute at the end of two months, should the money not have been repaid; 3d, a receipt for the above money, containing also an acknowledgment, that the *mokurreree* right of the grantee had been transferred to the defendant, under the stipulations of the conditional sale. The Zillah Judge admitted the *mokurreree potta*, as bearing the seals of the *jagirdars*; and, as it bore date 15 years before the present suit, considered the plaintiff's claim to set aside the *mokurreree* tenure to be not cognizable, under the rule of limitations. Judgment was accordingly given in the Zillah Court against the plaintiff, with costs.

On appeal by him from the Zillah decree to the Provincial Court of Patna, that Court did not concur in it. The evidence of Aleem Ollah having been taken as a witness, respecting the *potta*,

he acknowledged, that, at the commencement of the decennial 1808. farm of the pergunnah, he granted the *mokurrere potta*, in the names of the jagirdars, though unknown to them, in favour of the Moobum-nazir, in a fictitious name, with a view to forward some business of mud Reazodeen, v. Akbur Ali Khan. the jagirdars then depending in the Civil Court. The Provincial Court held, that the *potta*, as having been granted by Aleem Ollah without the knowledge or authority of the jagirdars, was altogether void and of no effect. That the claim was barred by the rules of limitation, was not admitted by the Provincial Court, because until the expiration of the lease at the end of 1201, the claimants were not informed of the transaction, and it was held that the limitation of time could only be counted against them from the period at which the fraud was discovered. The Provincial Court, accordingly, setting aside the *mokurrere potta* under which Reazodeen had held the mouza at a *jumma* of 101 rupees, passed a decree in favour of the jagirdars, for possession of it, and for the difference of profits since the commencement of the action, but not for those realized before that period, as the *potta* was considered to have been in force to the prejudice of the jagirdars, so long as the jagirdars, after learning that the *potta* had been granted in their names, omitted to take legal means for setting it aside. Costs were made payable by Reazodeen.

On a special appeal by Reazodeen from the above decision to the Sudder Dewanny Adawlut (present J. H. Harrington and J. Fombelle,) this Court, concurring in the opinion that the *potta*, having been granted without the knowledge or authority of the jagirdars, was illegal and invalid against their right and interest in the *jagir*, and that the jagirdars were entitled to recover possession, affirmed the decree passed by the Provincial Court in their favour, together with the order relative to mesne profits, as given by that Court. The appeal to the Sudder Dewanny Adawlut was accordingly dismissed, with costs.

SHAM RAI and NURSING DEO RAI, Appellants,

1808.

versus

COLLECTOR of JESSORE and SRIKISHEN KONLA PRAN, July 5th.
Respondents.

THIS was an action brought by Srikishen Konla Pran and the Claim to certain lands, as Collector of Jessore, in the Civil Court of that district, on the 7th included in of September 1802, or 23d of *Bhadon* of the Bengal year 1209, against Sham Rai and Nursing Deo Rai, for possession of the mouzas a pergun-Dureadanga, &c. five in number, situated in pergunnah Ramchun-nah sold to derpore. The annual produce of the mouzas was stated at 2,500 the plain-tiff at pub-lic auction, mouzas are situated, was sold by public auction, by the Collector of but with- the district, on the 22nd of April 1797, on account of arrears of reve- held by the nue due from Srikaunt Rai, the former zemindar; and was purchased defendant on the plea by the plaintiff Srikishen. The defendants were, at the time, in of a prior possession of the mouzas in question; and, when the plaintiff private

1808. **dispossessed them, on his purchase of the pergunnah, they brought a summary suit against him under regulation 49, 1793. The result was a summary judgment for the defendants being reinstated in possession, with liberty to the plaintiff to bring the present regular action, to prove his right, in which he was joined by the Collector of the district, under an order from the Board of Revenue. The defendants asserted a right to the mouzas under a private purchase from the former zemindar, which they stated to have been made (on the 8th of October 1796,) prior to the public sale, and at a time when an attachment, before placed on the estate, had been withdrawn. They further stated, that the mouzas had been separated from the rest of the estate, and registered as an independent talook. In proof of these facts the following documents were adduced: 1st, copy of a *purwand* from the collector, removing an attachment from the estate of Srikaunt Rai, dated the 1st of September 1796. 2nd, a bill of sale for the mouzas in question, from Srikaunt Rai to the defendant Sham Rai, for 1,300 rupees, dated, as abovementioned, in October 1796. 3d, an *umulnameh* from the acting collector to Sham Rai, under date the 11th of March 1797, stating the separation of the mouzas from the rest of the pergunnah, in consequence of the plaintiff's application, at a *jumma* of 1,303 rupees. On the other hand, the plaintiffs, who asserted the private sale to the defendants to have been fraudulent, proved, that the Board of Revenue had disallowed the separation of the mouzas, and adjustment of *jumma* made on them by the Collector, and had given a subsequent order for the talook being re-annexed to pergunnah Ramchunderpore, and for its being sold with that pergunnah; and that the whole was accordingly sold to the plaintiff. The Zillah Judge saw no valid objection to the private sale of the lands in question, by the late zemindar to the defendants, and held that the public sale of the pergunnah to the plaintiff, could not avail against it. Judgment was accordingly given against the plaintiffs, in the Zillah Court, with liberty to Srikishen, the purchaser at the public sale, to sue Government for the value of the lands.**

purchase from the late zemindar. The private sale adjudged invalid, (although the lands had been separated and assessed by the collector;) as the sanction of the Board of Revenue, which the regulations require in such cases, had not been obtained; and the Board had re-annexed the lands to the pergunnah, and included them in the public sale. Judgment for the claimant.

On appeal by the plaintiffs from the above decision to the Provincial Court of Calcutta, that Court did not concur in it; but, on proof that the estate of Srikaunt Rai was in balance to Government at the time of the private sale to the claimant, was of opinion that, under such circumstances, the estate being responsible, generally, for his arrears, the zemindar was not authorized to sell any of his lands; and held that the private sale was invalid, and the claimant, as purchaser of pergunnah Ramchunderpore, entitled to the mouzas in question. Judgment was passed accordingly by the Provincial Court, reversing the decree of the Zillah Judge, with costs in both Courts against Sham Rai and Nursing Deo Rai.

On appeal by these persons from the above decision to the Sudder Dewanny Adawlut, the Court remarked, with respect to the stated purchase of the appellants, that, as a period of four months appeared to have intervened between the date of the purchase, and the registry of it in pursuance of regulation 36, 1793, and another month between that time and the sale being notified to the Collector, in order to obtain a separation of the

lands, and this too at a time when parts of Srikaunt Rai's estate were about to be sold for balances, some suspicion attached to the fairness of the transaction. At all events, as it was clear that the Board of Revenue, whose authority for all new allotments of the public assessment is required by the regulations, had disallowed the separation of the lands and allotment of *jumma* made by the collector, as not having received their sanction, and, under the discretion vested in them in such cases, had caused the lands to be included in the public sale of *pergunnah* Ramchunderpore, of which they formed part, for arrears of revenue due from the zemindar, the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), held, that the respondent was entitled to the lands under his public purchase. Final judgment was therefore passed, confirming the decree of the Provincial Court for the respondent having possession of the lands; with an order for his obtaining an account of mesne profits since the date of his purchase. Yet, since a bill of private sale had been granted by Srikaunt Rai to the appellants, and the lands had been separated from the zemindary by the collector of the district, as the purchaser's talook, at a *jumma* of 1,303 rupees, to the amount of which allotment of *jumma*, the Board of Revenue, on a reference made to them, offered no objection; and as the Board, on the sole ground that the separation and allotment of revenue had not received their sanction (which, by the regulations, is requisite to the distinct assessment of any portion of an estate), had, without regard to the private sale in question, caused the lands to be included in the public sale of *pergunnah* Ramchunderpore, for the arrears of revenue due from the zemindar, though there were other parts of his zemindary which they might, with equal advantage, have caused to be sold for that purpose; the Court considered that the appellants, if their purchase were real (and there was no proof that it was not), had been hardly treated, and that they ought not to be subjected to heavy costs for having defended the present suit. It was directed that the costs in the Zillah and Provincial Courts, which the decree of the latter Court made payable by the appellants, should be paid by the collector on the part of Government; that in this Court the appellants should pay only their own costs, those of the respondents being payable by Government. The appellants were at the same time informed that an action would lie against Banikuuth, the heir of Srikaunt Rai, for the purchase money of the talook, if the same had been paid to him. (a)

(a) The particular regulations which governed the final judgment on this case, are regulation 1, 1793, section 10, containing rules for distributing the fixed assessment upon portions of estates; the rules contained in regulation 25, 1793, for the division of estates paying revenue to Government, section 28 of which provides that the whole estate is to be held answerable for the public revenue, assessed upon it, until the division shall have been finally adjusted, with the concurrence of the Board of Revenue, or Governor General in Council; and as explanatory of the general rules in force, section 12, regulation 1, 1801, which declares, that all new allotments of the assessment are to be reported for the sanction of the Board of Revenue, and are not to be deemed conclusive or valid, till confirmed by that Board; or, in the event of any reduction of the fixed assessment, till approved by the Governor General in Council.

1808.

July 15th.

MUSSUMMAUT MUKHUN, Appellant,

versus

MOHUNT RAMPERSHAUD, Respondent.

Claim to principal and interest of a mortgage bond, adjudged; together with interest accruing during the trial of the suit. Entry of part payments in commercial account books of the debtor, produced in evidence by his heir, not admitted as sufficient. Construction of section 6, regulation 15, 1793.

THIS was an action brought by Rampershaud in the City Court of Patna, on the 2d of June 1795, against Mussummaut Pyman and Mussummaut Mukhun, to recover the sum of 6,258 rupees, as principal and interest due on a bond. The bond, bearing date the 25th of *Rujab* of the *Fuslee* year 1200, or 9th of March 1793, purported to have been executed to the plaintiff by the late Ramchund Sahoo, for the sum of 5,000 rupees, bearing interest at the rate of one *per cent per mensem*, and payable at the expiration of two years; and contained an assignment of two houses and a garden (left in the debtor's possession) as security for the payment. The period limited for payment having now expired, and the amount due on the bond, with interest at the rate abovementioned, amounting to the sum specified in the plaint, being stated to be unpaid, the plaintiff brought his action for satisfaction of the bond, against the defendants, as heirs of Ramchund Sahoo, Mussummaut Pyman being his widow, and Mussummaut Mukhun the widow of his son. The defendant Mussummaut Pyman (who stated that she alone was responsible for claims on her husband's estate) admitted the bond, but pleaded, 1st, that the property specified by the plaintiff, as having been assigned as security for the money, had been previously mortgaged by her husband, and was in the possession of another person; 2d, that a considerable part of the amount of the bond had been repaid. To prove this, the defendant produced the commercial account books of her late husband, Ramchund Sahoo, in which different sums, to the amount of 3,300 rupees, were entered as having been paid towards liquidating the bond. The plaintiff however denied the receipt of these sums; and as none of the payments were endorsed on the bond, or otherwise acknowledged, in writing, to have been received, or (as observed by the City Judge) proved by witnesses for the defendant; it was the opinion of the Judge, that the account books were not sufficient to establish the fact. Judgment was accordingly given in the plaintiff's favour in the City Court, for the recovery of the amount claimed, and costs, from the estate of Ramchund Sahoo.

On appeal by the widow from the above decision to the Provincial Court of Patna, that Court concurred in the City decree, and confirmed it, with costs against the appellants, and with interest on the amount adjudged, from the date on which the decree of the City Court was given.

In this interval Mussummaut Pyman died; and Mussummaut Mukhun made a further appeal to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle). This Court, on going into the case, concurred in considering the respondent's claim established, with an exception of the sum of 75 rupees, which, from the evidence of one of the respondent's witnesses in the City Court, appeared to have been paid by Ramchund to the respondent, on account of interest due on the bond, about two months after the date on which it was executed. At the same time, it

appeared to the Court, that the respondent was entitled to interest for the period of nearly nine years, during which the suit was depending in the City Court, but for which period no interest was included in the judgment of the City and Provincial Courts. The respondent had not demanded this interest, in his regular pleadings in either of the appeals; and the Sudder Dewanny Adawlut, on his entering a petition for its being adjudged, required that he should make oath as to his receipts of interest from the date of the bond to the time the suit was instituted; and he made oath, that, with the exception of the above 75 rupees, no sum had been received by him. Final judgment was therefore given in favour of the respondent, for the recovery of the principal of the bond, from the estate of Ramchund Sahoo, with interest (deducting the 75 rupees received) from the date of the bond to that on which the final decree should be carried in execution. (a)

1808.
Mussum-
maut Mu-
khun, v.
Mohunt
Ramper-
shaud.

MIRZA MOOHUMMUD and HYAUT-O-NISA, Appellants, 1808.

versus

JAREUT OZ ZOHRA BEGUM, HYDEREE BEGUM, MIRZA SUFDUR ALI and GHUZUNFUR ALI, Heirs of FATIMA BEGUM, Deceased, Respondents. July 22nd.

THIS was an action brought by the heirs of Fatima Begum in the Zillah Court of Mymensing on the 7th of July 1803, or 24th of Asark of the Bengal year 1210, against Mirza Moohummud and Hyaut-o-Nisa, to recover possession of a 5 ana, 2 cownie share of the talook Joar Burmee, situated in Tuppa Rumbawal. The annual produce of the share in question was stated at 4,082 rupees. The talook had been the property of a person named Aka Mirza, who died in the year 1160. His family was as follows:

Claim by the heirs of a widow, to a talook, as having belonged to her, adjudged, on proof of her title to it; her husband having made it over to her at his death, in satisfaction of dower, settled on her at marriage; and she having held it till her decease (33 years), without her title being disputed by any of her husband's heirs.

AKA MIRZA and MARIUM BEGUM.

1	2	3	4	5	6	7	8
Mirza Bakir, who was married to Fatima Begum, deceased, the sister of the plaintiffs.	Mirza Ubdolla.	Moohummud Hoesin.	Ahmud Ali. Hyaut-o-Nisa, defendant.	Zeenut Begum.	Zobeida Begum.	Khudija Begum.	Fatima Begum.
		Mirza Moohummud, defendant.					

(a) The plaintiff in this case sued for principal and interest of the sum due to him, and calculated the interest up to the time of his plaint. This was all he could be expected to do; and there was evidently no just reason for depriving him of the further interest which became due, under the defendant's denial of his claim, during the long period it was under investigation. He might perhaps have acquiesced in the judgment of the City Court, if the defendant had not appealed; but having been kept out of the receipt of his money by two appeals, the Sudder Dewanny Adawlut considered it just to let him receive the full benefit of the appeal to that Court. It may be added, that the restriction contained in section 6, regulation 15, 1793, against a judgment for interest exceeding the amount of the principal, when the legal interest "shall have accumulated so as to exceed the principal," was not applicable in the present instance, wherein the accumulation was subsequent to the institution of the suit, and not ascribable in any degree to procrastination on the part of the creditor.

1808.

Mirza
Moohum-
mud and
Hyaat-o-
Nisa, v.
Jareut oz
Zohra Be-
gum, Hy-
derve Be-
gum, Mirza
Sufdur Ali
and Ghu-
zunfur Ali.

It was stated on the part of the plaintiffs, that, on the decease of Aka Mirza, his estate was divided among his widow and children, according to the legal rule of distribution; that Mirza Bakir, the eldest son, obtained a share of 2 anas 10 gundas of the talook, in addition to which he made purchases from some of the other sharers, so that his whole property in the talook was 5 anas 2 cowries, the portion sued for. This was stated, by the plaintiffs, to have been made over by him before his death to his wife Fatima Begum, in satisfaction of dower settled on her at marriage; to have been held by the widow during her life; and to have been illegally taken possession of, at her death, by the defendants, who were holders of other parts of the talook. The plaintiffs claimed to recover the share in dispute, as heirs of the widow. The defendants denied that any partition had taken place on the decease of Aka Mirza. They affirmed that the talook had been held, after his death, by his four sons, jointly; all of whom were now deceased; that the possession and management had now devolved on them, the defendants; and that, even had the partition been made, Fatima Begum could not have been entitled to the share, which the plaintiffs claimed in her right. It appeared from the evidence of the plaintiff's witnesses, corroborated by the documents produced in the case, that the talook, with other lands, was actually divided among the heirs of Aka Mirza soon after his decease, according to the Moohummudan law of inheritance; and that Mirza Bakir the husband of Fatima Begum, obtained a share of 2 anas 10 gundas of the talook under the division then made. To prove the right of Mirza Bakir to the remainder of the share in dispute, the plaintiffs brought forward the following documents: 1st, a bill of sale by Moohummud Hosein (3d son of Aka Mirza) to Mirza Bakir, for half of his share, viz, 1 ana 5 gundas, dated in 1166. 2nd, bills of sale from Zeenut Begum and Zobeida Begum (1st and 2nd daughters) for half of their respective shares, which were 1 ana, 5 gundas, 2 cowries each, dated in 1165. It appearing to the Zillah Judge to be established, that Mirza Bakir, in his own right as one of the heirs of Aka Mirza, and by the purchases recited in the above documents, was entitled to 5 anas 2 cowries of the talook; and it being proved by the witnesses for the plaintiffs that this share was made over by Mirza Bakir, shortly before his decease, to his wife Fatima Begum, in satisfaction of her dower, and that she remained in possession of it accordingly until 1204, the period of her death; it was considered that the plaintiffs, who, as she died without issue, were her legal heirs, were entitled to the share in question. Judgment was in consequence given for the plaintiffs, in the Zillah Court, with costs against the defendants.

On appeal by the defendants (Mirza Moohummud and Hyaat-o-Nisa) from this decision of the Zillah Judge of Mymensing to the Provincial Court of Dacca, that Court concurred in it, and dismissed the appeal with costs.

On a further appeal by the defendants to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), this Court, on a consideration of the evidence and documents brought forward in the case, also concurred in the decision passed by the Zillah Judge. The Court observed, that, after the death of Mirza Bakir, Marium Begum and Khudija Begum, his mother and sister, who,

had the property been divisible among the heirs, would, as well as the widow, have been entitled to share in it, never preferred any claim to share in it, but, on the contrary, appeared to have signed a *hissa-nameh*, or deed defining shares in the talook, in which they admitted the right of the widow to the whole of her husband's share, in lieu of dower; that it did not appear that any other heir of Mirza Bakir ever claimed a division; and that it was evident the widow had been in possession since her husband's death to the time of her own decease, a period of thirty-three years. Under these circumstances, the Sudder Dewanny Adawlut being of opinion, that the widow was the legal proprietor of the share in dispute, and that the respondents, as her heirs, were entitled to recover, affirmed the decrees passed in favour of their claim by the Zillah and Provincial Courts, and dismissed the appeal with costs. An order was at the same time passed, that the appellants should account for the mesne profits since the date of the action in the Zillah Court.

1808.
Mirza Moohammed and Hyaut-o-Nisa, v. Jareut oz Zobra Begum, Hyderabad Mirza Sufdar Ali and Ghuzunfar Ali.

HINCHA SING and LUCHMUN SING, Appellants,

1808.

versus

DULELA RAI, Respondent.

Aug. 1st

THIS was an action brought by Dulela Rai, in the Zillah Court of Sarun, on the 10th of November 1798, or 17th of *Aghun* of the *Fuslee* year 1206, to recover from Hinchha Sing and Luchmun Sing, a half share of Salahpore and two other mouzas, and a fourth share of mouza Akilpore, the whole consisting of about 1,907 beegas of land. The annual produce was estimated at 1,901 rupees. It was alleged by the plaintiff, that the lands in dispute were his property by succession to his late brother Mittr Sein, and unjustly withheld from him by the defendants; that, several years ago, his brother, from motives of private convenience, annexed his lands to the talook of Bhye Deo Sing, grandfather of the defendant Luchmun, and registered them in his *furzee* name; that he continued however to hold possession, and to pay the revenue, as proprietor, till 1202, when the two defendants, by collusive means, and pretending a sale from the latter to the former, contrived to obtain possession. The defendants denied the claim to have any ground. They admitted that the lands once belonged, in part, to Mittr Sein, brother of the plaintiff; but stated that they were now the sole property of the defendant Hinchha Sing, by purchase. The documents adduced in proof of this, were, 1st, bills of sale for the lands in dispute, dated in the *Fuslee* year 1182, (one for the moiety of Salahpore, &c. and another for the fourth share of Akilpore,) from Choonk Rai and Mittr Sein, proprietors, to Bhye Deo Sing; 2nd, bills of sale from the defendant Luchmun (who succeeded as heir on the death of Bhye Deo Sing) to the defendant Hinchha Sing, dated in 1198. The plaintiff principally rested his claim on a document termed *Umanul-nameh*, or deed of trust, purporting to have been executed by Bhye Deo Sing to Mittr Sein,

On a claim to certain lands as the right of the claimant by succession to his late brother, a deed, exhibited by the claimant to prove the title of his brother, as rejected by the Sudder Dewanny Adawlut, as a fabrication; and judgment passed against him.

1808. the plaintiff's brother, in 1182, reciting, that he had received an ostensible bill of sale for the lands from Mittr Sein, who was still the real proprietor; and that he had engaged to surrender the bill of sale, on demand. The defendants affirmed this to be a fabrication. It appeared to the Zillah Judge to be proved, by documents and other evidence of the defendants, that the plaintiff's brother had for some time held the lands in farm; but that Bhye Deo Sing, or the defendant Luchmun, were proprietors, from 1182 to 1198; and the defendant Hinchha Sing from the latter year. The deed of trust produced by the plaintiff was rejected by the Zillah Judge, who concluded it to be a forgery; and as the two successive sales of the lands in dispute appeared to him to be established, and he considered Hinchha Sing to be the legal proprietor of the lands, by purchase from the other defendant, judgment was given against the plaintiff in the Zillah Court, with costs.

Hinchha
Sing and
Luchmun
Sing, v.
Dulela Rai.

On appeal by the plaintiff from the above decision to the Provincial Court of Patna, that Court concurred with the Zillah Judge in rejecting the deed of trust, and in considering the claim not established; and consequently affirmed the decree on the 10th of August 1801. Subsequently to this, however, and after the period limited for an appeal to the Sudder Dewanny Adawlut had expired, Dulela Rai petitioned the Provincial Court for a review of their proceedings, on the ground that the deed of trust had been wrongfully rejected: and that Court having thought proper to admit the petition, and having obtained the permission of the Sudder Dewanny Adawlut (as required by the 2nd section of regulation 2, 1798) proceeded to a review of the case; and, on evidence brought to prove the execution of the *Umanut-nameh* (though the persons who gave it were not those whose names were affixed as subscribing witnesses) admitted the document in evidence for the claimant, and considering Mittr Sein, the claimant's brother to have been the proprietor of them until the time of his decease, decided that the claimant, as his heir at law, was entitled to the succession. The decree of the Zillah Court, and the former decree of the Provincial Court, passed against the claim of Dulela Rai, were accordingly reversed, and judgment passed, on the 1st of December 1806, for his recovering the disputed lands.

A special appeal from the above decision on the part of Hinchha Sing and Luchmun Sing, was admitted by the Sudder Dewanny Adawlut, on the circumstances of the case, the Provincial Court having reversed the decree of the Zillah Judge, and their own original decision, after an interval of more than five years. On going into the merits of the case, the Sudder Dewanny Adawlut considered the deed of trust, on which the second decision of the Provincial Court was founded, and for the execution of which no probable reason was assigned, to be an evident fabrication. The reasons for this opinion were as follows; 1st, it was evident that two distinct bills of sale were executed by Mittr Sein and Choonk Rai, for the sale of the disputed lands to Bhye Deo Sing; whereas the deed of trust mentioned only one bill of sale as having been executed for the whole. 2d, the date of the deed of trust was only a day or two later than that of the bills of sale; the witnesses of the respondent admitted the whole to have been executed nearly

about the same time, and the respective deeds to have been exchanged between Mitr Sein and Bhye Deo Sing, in the presence of a person who was at the time *naib cazee* of the pergunnah : but the attestation of the *naib cazee*, affixed to the bills of sale, differed materially from the attestation, purporting to be by the same person, affixed to the deed of trust ; and the present *cazee* of the pergunnah, whose evidence was called for by the Court, verified the attestation on the deeds of sale, but could not speak to that on the other instrument. Whether the deed of trust had really been registered or not, could not be determined, the books of registry having been burnt in 1191. 3d, had the deed of trust been genuine, and the lands in reality been the property of Mitr Sein after the ostensible sale of them to Bhye Deo Sing, no reason appeared why Mitr Sein, at the period of the decennial settlement, when the proprietors of lands were summoned by proclamation to appear, and enter into engagements for the public revenue, should not have appeared as proprietor of the lands in question ; which it was clear he did not do. And it was found, that afterwards, in 1202, disputes having arisen about the purchase and sale of the lands, between the two appellants, Luchmun and Hinchha Sing, the collector sent for Mitr Sein, then in possession as tenant, to question him respecting the owner of the lands. At that time, had the deed of trust been in existence, Mitr Sein would certainly have stated that he was himself proprietor ; whereas (as appeared from the proceedings of the collector, bearing date the 26th of *Maug* 1202,) he stated that he held under Luchmun Sing, the same whose name was set down as proprietor in the papers of the decennial settlement, and other records of the collector ; and the collector, in consequence, then directed that Luchmun's name should stand, as proprietor, until Hinchha Sing should have established the stated purchase. Besides, though Mitr Sein knew of this purchase, (as afterwards established by Hinchha Sing,) it did not appear that he ever made any claim on Hinchha Sing, under the deed of trust, or that he ever produced it during twenty years, which elapsed between its alleged date, and the time of his decease. Under these circumstances, the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle,) rejected the deed of trust, and not considering the title of the respondent's brother, or the claim of the respondent, to be established, reversed the second decree of the Provincial Court of Patna, and affirmed the judgments originally passed against the claim, by the Zillah and Provincial Courts, with a final order that Hinchha Sing should retain possession of the lands, as his right by purchase from the other appellant. The costs in all the Courts were made payable by the respondent.

1808.

Hinchha
Sing and
Luchmun
Sing, v.
Dulcra Rai.

1808.

HEIRS of SHAMCHURN SING, Appellants,
versus

Aug. 5th.

HEIR of OMR SING, Respondent.

Claim by A on B, for the value of timbers alleged to have been his property, sent down to Calcutta for sale on his account, and illegally seized by B, claim dismissed, on proof that the timbers were provided for B, in pursuance of a contract with C and D; and that A, who was only surety for their conveyance to a certain distance, had no legal right or interest in them after their conveyance to that distance.

THIS was an action brought by the late Omr Sing in the Zillah Court of Purnea, on the 17th of May 1804, or 6th of *Jeth* of the Bengal year 1211, to recover from the heirs of Shamchurn Sing, the sum of 630 rupees, as the value of 42 pieces of timber, alleged to have been the property of the plaintiff, and illegally taken possession of by Shamchurn Sing. It appeared that a person named Bhitree had contracted to supply Shamchurn Sing with timbers to a certain value, at Calcutta, from Morung (to the northward of Tirhoot), and, in consequence of the non-performance of the contract, Shamchurn had sued Bhitree, and a person named Mudaree, who was his security, for the value of the timbers contracted for, and had obtained a judgment for the amount, with interest. To discharge the sum due under this judgment, which was 1,095 rupees, Bhitree and Mudaree, after paying 95 rupees in cash, entered into a written engagement for liquidating the balance by instalments, by delivering at Calcutta, to the agent of Shamchurn, Morung timbers of stated dimensions, at 10 rupees per timber. The periods were, in 1204, 40 timbers, value 400 rupees; in 1205, 20 timbers, 200 rupees; and the same in 1206 and 1207; total value 1,000 rupees. The plaintiff was security, under this engagement, for the conveyance of the timbers to Nawaubgunge, on their way to Calcutta, under pain of forfeiting 5 rupees per timber. It was stated by the plaintiff in bringing the present action, that in 1204, forty timbers were forwarded by him from Morung; that, on their arrival at Nawaubgunge, the plaintiff required a receipt for them from the agent of Shamchurn, and offered to deliver them, but that the agent refused to receive them; that the timbers being in consequence left on the plaintiff's hands, he forwarded them to Calcutta in charge of his brother, for sale on his private account; that, when they arrived at Busbareea, near the Presidency, several persons offered to purchase them at 15 rupees per timber; but that Shamchurn's people took forcible possession of them. The plaintiff, therefore, sued for the sum stated in the plaint, as the value of them at the price offered at Busbareea. The defendants denied that the plaintiff had any just claim relative to the timbers, stating, that the agent of Shamchurn received them at Busbareea, in conformity with the contract, and that the plaintiff could have had no title to sell them on his private account. As the agent of Shamchurn had refused to give a receipt for the timbers at Nawaubgunge, on the tender of them there by the plaintiff, according to his part of the engagement, it was the opinion of the Zillah Judge, that the plaintiff was authorized to forward them for sale on his private account, and that Shamchurn, in taking forcible possession of them at Busbareea, which, from the depositions of witnesses for the plaintiff it would appear he had done, was responsible to the plaintiff for the sum at which the latter could have disposed of them. Judgment was therefore given in the plaintiff's favour, in the Zillah Court, for recovering the amount claimed; with costs against the defendant.

On appeal by the defendant from the above decision to the Provincial Court of Moorshedabad, that Court concurred in it, and affirmed it, with costs against the appellant, and interest on the sum adjudged, from the date of the action. 1808.

Heirs of
Shamchurn
Sing, v.
Heir of
Omr Sing.

On a special appeal which the Court of Sudder Dewanny Adawlut judged it proper to admit, from the above decisions, the Court reversed them, for the following reasons; 1st, the Court observed, that the plaintiff's offer of delivering to the agent of Shamchurn, at Nawaubgunge, the timbers which he stated to have been brought from Morung, was a virtual acknowledgment that they were on account of the instalment due to Shamchurn, under the contract of Bhitree and Mudaree, for the year 1204; and it appeared to the Court, that on the arrival of the timbers at Nawaubgunge, whether Omr Sing, the surety for their conveyance to that place, obtained a receipt for them or not, so long as he could prove their conveyance thus far, that part of the engagement for which he was answerable was performed, and from that time, he had neither any interest in the timbers, nor any responsibility respecting them; and it was ascertained that the agent of Shamchurn, who refused to grant a receipt for the timbers at Nawaubgunge, did so on the ground that no receipt was demandable before they should arrive at the place of their final destination. It was further ascertained, that Mudaree, one of the parties to the engagement, came with the timbers from Nawaubgunge to Busbareea, as well as the brother of the claimant, and that Mudaree resisted the proposal of the other to sell the timbers, declaring, that they must be delivered to Shamchurn, the predecessor of the appellants, in discharge of the instalment of 1204; and it also appeared that, on the agent of Shamchurn taking possession of them at Busbareea, Mudaree took a receipt from him, as having delivered the timbers in pursuance of the contract. Independently of these circumstances, it was observable, that the present claim was not brought forward by Omr Sing until after the death of Shamchurn, which was several years after the transaction took place; whereas, had Omr Sing supposed the claim to be well founded, there was no reason why he should have failed to prefer it during the life-time of the person to whom it was alleged to attach. The Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), accordingly, being of opinion that Shamchurn, of whom the appellants were heirs, was justified in taking possession of the timbers at Busbareea, in pursuance of the contract, reversed the decrees passed by the Zillah and Provincial Courts, with costs, in each of the Courts, payable by the respondent.

1808.

SHEIKH BHAUDER ALI, Appellant,

versus

Aug. 8th.

SHEIKH DHOMUN, MUSSUMMAUT MAUN BEEBEE, and
NUSRUT ALI, Respondents.

Claim to 7
anas of a
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mash* es-
tate, on the
ground of
that share
being the
plaintiff's
right as one
of the heirs
of the per-
son by
whom the
estate was
acquired.
A grant
obtained
by the ac-
quirer, in
the sub-
stituted
name of a
female re-
lation,
(with the
apparent
intention
of enabling
her to take
the estate
at his
death,) of
no avail,
under the
Moohum-
mudan law,
against the
right of the
legal heirs
of the real
grantee. A
6ana share,
to which
the claim-
ant appear-
ed entitled
as heir,
adjudged
to him with
resne pro-
fits. Re-
maining
shares
at the
same time
adjudged to
other heirs,

THIS was an action brought by Bahauder Ali in the Zillah Court of Tirhoot, on the 24th of August 1801, or 1st of *Bhadon* of the *Fuslee* year 1208, to recover from Sheikh Dhomun, &c. the sum of 5,250 rupees, as produce, during the years 1206, 1207, and 1208, of a 7 ana share of mouzas Shahpore, &c. The annual produce of the whole was estimated by the plaintiff at 14,000 rupees. It was set forth in the plaint, that the estate, of which a 7 ana share was stated by the plaintiff to be his right, was acquired in the year 1176 by the late Mohib Ollah, exempt from revenue, by the title of *mududmash*, under a grant from the King, at Delhi, in the *furzee* or substituted name of his mother Kheir-on-Nisa; that that the grantee was in possession till his decease, in 1205; that, as he had no children, he had previously to his death drawn up a written instrument, declaring his heirs to be the plaintiff, son of his elder sister; Duleel Ollah, son of his younger sister; and the defendant Maun Beeber, his wife; and assigning to the latter a 2 ana share of the estate, and to the two former 7 anas each; that, as the estate had been famed to the defendant Nusrut Ali, he remained in possession after the death of Mohib Ollah; but that, on a renewal of his *pottahs* being refused in the beginning of 1206, he, in concert with the other defendants, had disputed the plaintiff's title to any part of the estate. The plaintiff accordingly sued for the produce of 7 anas. The defendants denied the plaintiff's title to any share of the estate, insisting, that, under the grant in favour of Kheir-on-Nisa (whom they stated to have been the mother of the defendant Dhomun, and not of Mohib Ollah,) the estate was the property of Kheir-on Nisa in her own right, and that Mohib Ollah merely managed on her part. The defendant Nusrut Ali stated himself to hold his farm from the defendant Dhomun, as son and heir of Kheir-on-Nisa. Witnesses for the plaintiff deposed, as stated by him, that Kheir-on-Nisa, whose name appeared in the grant, was only the nominal grantee; and that Mohib Ollah, to whom the grant was actually made, possessed as proprietor, and was such at the time of his decease. Under the written instrument, adverted to by the plaintiff in his statement, purporting to have been executed by Mohib Ollah, the Zillah Judge considered the plaintiff entitled to 7 anas of the estate, and consequently to recover the produce of the share during the years specified in the plaint. The sum, however, claimed as the produce of those years, was not admitted by the defendant Nusrut Ali, (the person in possession as farmer), who affirmed the annual produce to be only 1,200 rupees; and as the plaintiff declined bearing the expence of an *aumin*, who should be deputed to the spot to determine the amount, the Zillah Judge adjusted the account at the rate stated by the defendant. By this computation, and deducting for charges of collection, the sum due to the plain-

tiff was 1,427 rupees, which amount was accordingly adjudged to him in the Zillah Court, to be recovered from the defendant Nusrut Ali, together with possession of the 7 ana share. The costs were given against the defendants jointly.

1808.

who became parties in the cause.

On appeal by the defendants from the above decision to the Provincial Court of Patna, that Court did not concur in it. The instrument, purporting to have been executed by Mohib Ollah, assigning to the claimant a 7 ana share of the estate, was rejected by the Provincial Court as suspicious and not established. The Court ascertained, from further evidence, that Kheir-on-Nisa, whose name appeared in the grant, was not the mother of Mohib Ollah, but the daughter of Mussumaut Rahima, his wife's sister; and that, being childless, he had always treated her as an adopted daughter of his own: and it appeared to the Court that his obtaining the grant in her name was with the view of settling the estate on her, and that it was her property under the grant; so that Sheikh Dhomun was entitled to it as her heir. It was accordingly concluded that the claimant had no title to the 7 anas, which he alleged to be his right. The decree passed by the Zillah Judge, in favour of his claim to the produce of it, was therefore reversed by the Provincial Court, with costs against him in both Courts.

An appeal was preferred by the claimant from the above decision to the Sudder Dewanny Adawlut, on the pleas of the grant having been merely in the *furzee* name of Kheir-on-Nisa; and of his right as an heir of the real grantee, Mohib Ollah. By a question proposed to their Moohummudan law officers, the Court, in the first place, ascertained, that *furzee* or fictitious names, in grants, have been frequently used in Hindostan, and have not been held to be illegal; that the right of property vests in the person to whom the grant is actually made, and not necessarily in the person whose name is made use of. The following questions, coinciding with the Court's view of the circumstances of the case, were then proposed to the law officers; 1st, if Mohib Ollah acquired the estate for himself, and caused the *furzee* name of his wife's niece, Kheir-on-Nisa, to be inserted in the grant, with the intent that he might have possession himself during his life, and that the estate might go to Kheir-on-Nisa at his decease, on the strength of the grant being in her name: in such case, after the decease of both of them, to the heirs of which person will the estate devolve? If it devolve to those of Mohib Ollah, to what shares will the appellant Bahauder Ali, and the other heirs, be respectively entitled, under the Moohummudan law of distribution? 2nd, if the heirs of Mohib Ollah, the grantee, were his widow Maun Beebee; Bahauder Ali, the son of his sister; and Duleel Ollah and Bechoo, sons of another sister; and if (as stated to the Court by the appellant) both sisters survived Mohib Ollah; or if (according to the respondents) both died before him; and if Duleel Ollah has since died, leaving a brother, his heir; to what shares of the estate will these persons be respectively entitled? The answers to these references were as follow: 1st, if Mohib Ollah obtained the grant for himself, his having caused the *furzee* name of his wife's niece, Kheir-on-Nisa, to be inserted in the grant, with the intent specified, will avail in law, as it was not in his

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Sheikh
Bahauder
Ali, v.
Sheikh
Dhomon,
Mussum-
maut Maun
Beebe, and
Nusrut Ali.

power thus to dispose, after his death, of property which he acquired for himself, and of which, during his life, he was actual proprietor; such property being by law descendible at his decease to the legal heirs. 2nd, if both sisters of the grantee survived him, and afterwards died leaving issue three sons; and if the grantee left no other heirs than his widow, and those sisters; a fourth of his estate would devolve to his widow, and the remainder to the sisters in equal shares; and on the demise of the sisters, their heirs would succeed them. In such case, the distribution will be, 4 anas to the widow; 6 to Bahauder Ali, son of one sister; and 6 to the surviving brother of Bechoo, son of the other sister. Again, if both the sisters died before Duleel Ollah, and his heirs were consequently, a widow, and three relatives on the female side; the distribution will be, 4 anas to the widow, and equal shares of the remaining 12 anas, to Bahauder Ali, Duleel Ollah, and Bechoo; and, on the decease of Duleel Ollah, his share will fall to his brother. On receiving these opinions of their law officers, it appeared necessary to the Court to call for evidence respecting the relative periods of the decease of Mohib Ollah, and his two sisters; but as the appellant, on being required to do so, failed to furnish proof on this point; and as Bechoo, and a person named Shumsuddin, who, it subsequently appeared, was a brother of that person, and therefore one of the joint heirs of his mother, after coming forward, and being admitted parties in the appeal, stated, the sisters to have survived Mohib Ollah, and consequently admitted the right of Bahauder Ali, the appellant, to the 6 ana share provisionally awarded by the opinion of the law officers; it appeared proper to the Court to ground their judgment accordingly; especially as Maun Beebe, the other heir, in a *razee-nameh* filed by her in conjunction with Bahauder Ali, had virtually admitted his title. Accordingly, the Court being satisfied that Mohib Ollah was actual proprietor of the estate till the time of his decease, which was several years after the death of Khair-on-Nisa, it was determined, agreeably to the opinion of the law officers, that, on the death of the grantee, the estate vested solely in his heirs, who were a widow, and two sisters; and that, on the decease of the two sisters, their shares devolved to their respective heirs; and the Court, in consequence, reversed the decree passed in favour of the title of Khair-on-Nisa by the Provincial Court. The distribution under the decree of the Sudder Dewanny Adawlut (present J. H. Harrington and J. Fombelle) was this; of the estate of Mohib Ollah, 4 anas being reserved as the right of the widow Maun Beebe, 6 anas were declared the right of the appellant Bahauder Ali, as the heir of the elder sister of Mohib Ollah, and 6 anas the right of Bechoo and Shumsuddin, as the heirs of the other sister; and possession was adjudged to them accordingly. The produce of the years specified in the original plaint was at the same time adjudged to the appellant Bahauder Ali, for the share declared to be his right, proportionately to the rate settled by the Zillah Judge, which Bahauder Ali admitted to be correct. The other heirs Bechoo and Shumsuddin, not having been originally parties in the suit, did not obtain a judgment for the produce of those years, but were left to sue for the recovery of it, in the event of its

being refused by the party who had been in possession of the estate. The costs in each of the Courts were made chargeable to the respondents. (a)

LAL ROODERPURTAB SING, a Minor, (with his Guardian
DOORGAPERSHAD,) Appellant,
versus
LAL DHOKUL SING, Respondent.

1908.

Sept. 2nd.

THIS was an action brought by Bickrumajeet Sing (the father of Lal Dhokul Sing) in the Zillah Court of Allahabad, on the 29th of August 1803, or 26th of *Bhadon* of the *Fuslee* year 1210, to recover from Lal Isruj Sing (the father of Rooderpurtab) on the ground of hereditary right, the talook of Dya, comprising about a moiety of pergunnah Kheiragurh. The *jumma* of this talook was stated at 80,000 rupees. It was set forth in the plaint, that the plaintiff and the defendant were descended from a common ancestor, who was zemindar of Kheiragurh; that, on a division of the estate, the talook of Maunda fell to the immediate ancestor of the defendant, and the talook in question to the ancestor of the plaintiff; that the plaintiff had been in possession of this talook till the end of the *Fuslee* year 1183, when he was dispossessed by the defendant; and further, that two villages belonging to the zemindary, which had been held by the Ranees of the plaintiff till her decease in 1204, had, at that time, been forcibly taken possession of by the defendant. The defendant denied the right of the plaintiff to any part of pergunnah Kheiragurh. He stated, that it had descended entire to one heir, for many generations: that his grandfather, Odwunt Sing, to whom he succeeded, was for a long period in sole possession; that he himself had possessed solely since his grandfather's decease; and that, at all events, the claim of the plaintiff was barred on account of the lapse of time, under the rules of limitation.—As it was admitted by the plaintiff that he had not been in possession of the talook claimed by him since 1183, a period of twenty-six years before the present action, the Zillah Judge (on the 2nd of January 1804) dismissed the claim, as not cognizable, under the 15th section of regulation 3, 1793, which limits the cognizance of suits to twelve years from the cause of action. The costs, however, were made payable by the parties respectively.

(a) Two important points were determined by the judgment of the Sudder Dewanny Adawlut in this cause, founded on the expositions of the Moohummudan law, given by the law officers of the Court; 1st, that a grant obtained in a fictitious, or substituted name, is not illegal; and that the property conveyed by such grant is vested in the real, not in the nominal grantee; 2nd, that a person obtaining a grant in the name of another, with an intention to hold the property himself during his life, and to secure the succession of the nominal grantee on his death, cannot thereby defeat the right of inheritance of his lawful heirs, who are entitled, on his demise, to succeed to the property of which he died possessed, as part of his estate. In explanation of the opinion delivered by the law officers on the second question, "that a person cannot thus dispose, after his death, of property acquired for himself," it should be remembered, that the Moohummudan law restricts testamentary bequests to a third of the testator's estate. See case of Ruzia Begum, v. Aka Moohummud Ibrahim, August 8th, 1806.

1808.

Lal Roon-
derpurtab
Sing, v.
Lal Dho-
kul Sing.

On appeal by the plaintiff from the above decision to the Provincial Court of Benares, that Court, on taking up the cause (after the enactment of regulation 2, 1805) issued an order to the Zillah Judge to examine witnesses named by the claimant (inhabitants of Kheiragurh), respecting the right of the claimant to the talook, and his alleged dispossession. It appeared to the Court to be proved, from their testimony, that the talook was the hereditary property of the claimant, and that he had been wrongfully dispossessed in the year 1183: and the Court did not consider the defendant or his ancestor to have been in possession under a *bond fide* title for twelve years before the suit was instituted. Hence, as under the 3d section of regulation 2, 1805, the period of twelve years prescribed by the former rule of limitation for the cognizance of suits, is declared to be not applicable to claims respecting landed property, of which possession has been obtained by fraud or violence, either by the actual occupant, or by the person from whom he derived his title, and which has not been subsequently held under a fair and honest title during a period of twelve years antecedent to a claim preferred to it, it appeared to the Court, that, under these rules, the cognizance of the case in question was not barred; and the Court, considering the claimant entitled to recover the talook, as his right by inheritance, passed judgment in his favour, reversing the Zillah decree; with costs in both Courts payable by Isruj Sing.

Soon after Isruj Sing had preferred an appeal from this decision to the Sudder Dewanny Adawlut, on the plea that the case was not cognizable either under the former, or newly enacted, rules of limitation; he died; as did also Bickrumajeet, the plaintiff; and they were each succeeded by their heirs as appellant and respondent in the cause. On consideration of the case, the Sudder Dewanny Adawlut did not concur in opinion with the Provincial Court respecting the claim being cognizable under the regulations. It had been admitted by the ancestor of the respondent, in his original plaint, that the ancestors of the appellant had been in sole possession of the zemindary since the beginning of 1184, a period of twenty-six years before the suit was instituted; and, from two documents of the appellant, viz. a *purwana* from the Nawab Vizier, and another from the resident at Lucknow, both dated in the *Fuslee* year 1190, it appeared to the Court to be proved, that Odwunt Sing, to whom Isruj Sing (the original defendant) succeeded, was in that year confirmed and acknowledged, by the Government for the time being, as sole zemindar of the pergunnah; and it was both proved and admitted, that, on the decease of Odwunt Sing in the year 1200, ten years before the present suit, Isruj Sing had succeeded to the zemindary, and had since held it by right of inheritance. Under the circumstances of possession having been held by Odwunt Sing for ten years with the authority and sanction of the government of the Nawab Vizier, and for ten years by Isruj Sing, his successor, by right of inheritance, the objection taken by the Provincial Court, namely, that possession of the zemindary had not been held during twelve years before the present action under a *bond fide* title, that is, a title which the possessor must have believed to convey to him a right of possession and property, appeared to the Sudder Dewanny Adawlut to be

inadmissible. With respect to the two mouzas, held by the Raneo of Bickrumajeet Sing (the original plaintiff), until her decease in 1204, within twelve years of the date of the present suit, the Court observed, that the claim to them stood precisely on the same ground with the rest, it appearing that they were held by her as a personal maintenance, lapsing to the zemindar at her demise, and that the tenure of them was not connected with any separate question of proprietary right. The Sudder Dewanny Adawlut (present J. H. Harrington and J. Fombelle), accordingly, being of opinion that the cognizance of the claim preferred by the respondent's father was barred under the rule of limitation laid down in the 15th section of regulation 3, 1793, as well as under the modification of that rule, contained in the 3d section of regulation 2, 1805, reversed the decree of the Provincial Court, and dismissed the claim; with costs in each of the Courts chargeable to the respondent.

1808.

Lal Rooderputab Sing, v. Lal Dhokul Sing.

HUREE MOHUN THAKOOR, Appellant,

versus

RAMNARAEN DEO, Respondent.

1808.

Sept. 12th.

HUREE Mohun Thakoor, who commenced this suit in the Zillah Court of Tipera, on the 31st of August 1805, or 4th of *Srawun* of the Bengal year 1212, had purchased at public sale the zemindary of pergunnah Patkurra, in which a dependent tenure, comprising mouza Konlapore and Adumsar, was held by the defendant. The plaintiff stated, that, according to actual survey and measurement, the rent payable on the lands tenanted by the defendant, for the year 1211, at the rate of similar tenures in the pergunnah, was 1,326 rupees; after deducting from which the sum of 605 rupees, paid up to *Cheit* of the above-mentioned year, there remained a balance of 721 rupees due, for that year, from the defendant; which the plaintiff sued to recover by a summary process. The defendant refused to pay rent to the plaintiff at the rate demanded by him, alleging, that both the mouzas were held by him at a *mokurreree* or fixed *jumma*. For the mouza Konlapore, he produced a *potta* from the late zemindar, fixing the *jumma*, at a reduced rate; but the Zillah Judge rejected it as illegal, under the rules contained in regulation 44, 1793, which prohibit proprietors of estates from fixing the *jumma* of dependent landholders for a longer period than ten years. As it did not appear that the defendant had entered into any engagement with the plaintiff for the lands occupied by him, or had shewn cause why the rate demanded should not be paid by him; the Zillah Judge, under the summary process directed in the 15th section of regulation 7, 1799, for the recovery of arrears of rent by a zemindar from his tenants, passed an order for the recovery of the sum in question, and costs, by the plaintiff; leaving an option to the defendant, should he think himself aggrieved, to institute a regular suit.

On a summary suit by the purchaser of a zemindary, against a tenant, for rent at the pergunnah rates, the tenant, who pleaded a fixed *jumma*, not having shown cause why the rent demanded should not be paid, such rent adjudged to the plaintiff, under regulation 7, 1799, with an option to the defendant to bring a regular suit. Zillah Judge

On appeal by the defendant from the above decision of the Zillah Judge to the Provincial Court of Dacca, that Court was of in such

1808.

case, to pass a summary decision, under the provisions of regulation 7, 1799, not appealable, (except on special grounds,) under the 18th section of that regulation.

opinion, that as the zemindar claimed rent at the pergunnah rates, and the tenant alleged a right to a *mokurreree* tenure, the Zillah Judge was not authorized to pass a summary judgment on the case, but should have referred the plaintiff to establish his claim by a regular suit. The Court therefore annulled the summary decision passed in favour of the zemindar, with an order that the costs should be paid by the parties respectively.

On a special appeal by the zemindar from the above decree to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), this Court was of opinion, that the Zillah Judge was competent to pass a summary decision in the first instance, under the 15th section of regulation 7, 1799, with a view to an immediate adjustment of accounts between the parties, according to the professed object of that regulation; and further, that such decision was not appealable (except on special grounds) to the Provincial Court, under the 18th section of the regulation, which declares that the summary judgments authorized by section 15, are not subject to appeal, as any person considering himself aggrieved by them, can have his remedy by a regular suit. The Court therefore annulled the judgment of the Provincial Court, and confirmed the summary decision passed against the respondent, by the Zillah Judge, with an option to the respondent to bring a regular action, if he thought himself aggrieved by the adjustment made of the rent payable on his lands. The costs in each of the Courts were at the same time adjudged against the respondent. (a)

(a) The Provincial Courts being empowered by the regulations to admit a special appeal from the decrees of the Zillah and City Courts, in all cases wherein a regular appeal may not lie to them, if, on the face of the decree, or from any information before the Provincial Court, it shall appear to them erroneous or unjust, or if, from the nature of the cause, it shall appear of sufficient importance to merit a further investigation in appeal, the exception taken by the Sudder Dewanny Adawlut to the admission of an appeal by the Provincial Court in this case, is, of course, applicable only to the admission of it as a regular appeal, without any grounds having been assigned to bring it within the rule for special appeals; in receiving which, the discretionary authority given for the correction of erroneous judgments in particular cases, is directed to be used with caution; and is declared not to entitle any party to demand, of right, an appeal to the Provincial Court, in cases wherein the judgments of the Zillah and City Courts are provisionally made final.

TEJCHUND, Zemindar of Burdwan, Appellant,

versus

JUGMOHUN RAI, (Heir of RAMKAUNT RAI), Respondent. Sept. 16th.

THIS was an action brought by the Raja of Burdwan in the Zillah Court of the district, on the 13th of July 1799, or 31st of Asarh of the Bengal year 1206, against Jugmohun Rai and two others, viz. Ramkaunt Rai and Ramnidhee Ghose, for the proprietary right of the Turuf Rusukpore and Poorgaon, and of the mouza Purobea. The annual *jumma* of the whole was stated at 8,056 rupees. It appeared that the lands in question, on being sold by public auction, in the month of *Jeth* 1204, on account of arrears of revenue due from the former proprietors, were purchased by the late Ranee Bishen Konwur, the mother of the plaintiff, in the *furzee* or substituted names of three different persons. The defendant Jugmohun, who was now in possession of the lands, affirmed, that the Ranee, finding difficulties with respect to the purchase money, resold them to him for 36,200 rupees, the sum for which she had bought them. The plaintiff denied that the stated resale was ever made, or the money received by his mother; and affirmed that the defendant had obtained possession by unfair means, at his mother's decease, in 1205. He accordingly sued to recover the lands, as part of the zemindary to which he had succeeded. The defendant Jugmohun, on the other hand, admitting the prior purchase of the Ranee, rested his title on the proof of the resale to himself. For this purpose, after filing some papers purporting to be bills of sale, to Jugmohun, as from the nominal purchasers, he adduced an *akhrnameh*, or written acknowledgment, purporting to have been executed by the late Ranee, and reciting, that on purchasing Turuf Rusukpore, &c. at the public sale, she borrowed of bankers a considerable part of the purchase money, and, not being able to repay them, resold the lands to Jugmohun for the same price she gave for them, and had received the money from him. This was dated the 1st of *Asin* 1204, and attested by three persons. Two of these were cited by the defendants to prove the execution. They deposed that they were called to witness it; that they heard the Ranee speak from behind the *purdah* or curtain where she was sitting; that they knew her voice; and that she said she had received the purchase money. They did not see the money paid. After the defendant Jugmohun had declared in Court, that he had no other proof of the resale, and could not adduce any to the actual payment of the money, a person named Bunchanun Rai was called by him, who deposed, that he took the amount in gold mohurs, from Jugmohun, to the residence of the Ranee; that, in his presence, it was given inside the *purdah* or curtain, to the Ranee; and that, on being desired to count it, she did so, and acknowledged it to be correct. No evidence to the execution or reality of the alleged deeds of sale was brought by the defendant; and as there was only one witness to the alleged payment of the purchase money, who moreover did not profess to have seen the Ranee, but merely to have heard her voice, and whose evidence, from the circum-

1808. stances attending it, as well as from the manner in which it was given, was not considered worthy of credit; and as there was moreover no receipt forthcoming for the purchase money; the Zillah Judge considered the payment not established. Independently of this, from strong suspicions against the *ikrarnameh*, he did not consider the evidence adduced to its execution sufficient to prove it. It was his opinion, that the alleged resale had been pretended, by Ramkaunt the father of Jugmohun (who had been *mokhtar* of the Ranee's estate), with a view to defraud the Ranee or her successor; and as he considered the Ranee to have been the real proprietor of the lands in dispute at the time of her decease, under her purchase at the public sale, and that the plaintiff was entitled to them as her heir, judgment was given in his favour in the Zillah Court, for recovering them. The costs were made payable by the defendants Jugmohun and Ramkaunt; the other defendant not appearing to have had any share in the transaction.

Tejchund,
r. Jugmo-
hun Rui.

On appeal by these persons from the above decision to the Provincial Court of Calcutta; the two Judges, who sat on the cause, differed in opinion. The Senior Judge considered the *ikrarnameh* established; that it afforded sufficient proof of a resale of the lands to Jugmohun; and that the decree passed by the Zillah Judge against his title, should be reversed. The Second Judge concurred in the Zillah decree and the grounds on which it was passed. The cause being for a value appealable to the Sudder Dewanny Adawlut, the Zillah decree was reversed, in conformity with the Senior Judge's opinion, and judgment given for Jugmohun's retaining possession of the lands.

On appeal by the claimant from the above decision to the Sudder Dewanny Adawlut, this Court did not concur in it. The Court considered, that the *ikrarnameh* attributed to Ranee Bishen Konwur was of very dubious authority, both from its appearing that the two persons who were called by the respondent to prove it, and who deposed that they heard the Ranee, at the time, make a verbal acknowledgment of its contents, bore such bad characters as to make their evidence suspected; and also from the circumstance of Ramkaunt, the father of the respondent, having, at the time the resale to his son was stated to have taken place, held the management and controul of the Ranee's zemindary; which, combined with its appearing that the reason alleged for the stated resale, viz. the Ranee's want of funds, was not true; and with the circumstance of there being no proof to establish the payment of the purchase money to the Ranee, though, if it had really been paid, there could, in all probability, have been no difficulty in proving the fact; afforded, in the opinion of the Court, strong ground to suspect, either that the written acknowledgment was false, or that it was obtained by undue means. This instrument therefore (the only proof on the part of the respondent to the alleged resale) not being considered by the Court as at all competent to prove it; the Court determined, that the conveyance from the appellant's mother, on which the respondent rested his title, was not established; and that the appellant was entitled to the lands, as part of the zemindary to which he had succeeded. Judgment was accordingly passed by

the Sudder Dewanny Adawlut (present J.^{*} H. Harington and J. 1808.
Fombelle), reversing the decree passed against the appellant's
claim by the Provincial Court, and confirming that passed by the
Zillah Judge, with costs in each of the Courts payable by the
respondent. Mesne profits during the time the claimant had been
out of possession, were not adjudged, as no claim^{*} had been pre-
ferred to them; but a right of action was reserved for their recovery,
if not paid on demand. (a)

Tejchnod,
v. Jugmo-
hun Rai.

KISHENMOHUN GOSAEN, Appellant,

1808.

versus

CHUTTER SING, Respondent.

Nov. 4th.

THIS was an action brought by Chutter Sing in the Zillah On the
Court of Midnapore, on the 1st of March 1802, or 9th of *Phagun* suit of A
of the Bengal year 1208, to recover from Kishenmohun the mouzas against B,
Pucharol, &c. four in number, the annual produce of which was for posses-
sion of
stated at 701 rupees; and 900 rupees, which had been awarded lands,
against the plaintiff by a summary sentence, as amount of collec- which A
tions forcibly made by him. These mouzas were situated in had assign-
pergunnah Boggree, the zemindary of the plaintiff. It was stated ed as a per-
in the plaint, that in 1191, the zemindary was taken out of the sonal main-
plaintiff's hands, and held *khas*, under the management of the tenance to
collector; that the mouzas in question were a part of certain lands his step-
assigned to him at the time, exempt from revenue, in lieu of the mother C,
profits of his zemindary, and were settled by him, *berai khor o* lately de-
posh, or as a personal maintenance, on his stepmother Ranee creased, and
Gobindmune, who died in 1207. The plaintiff claimed them as which B
having reverted to him on her demise. The defendant had taken had taken
possession of them when the Ranee died, under a gift alleged possession
to have been made by her in his favour, shortly before her death. of, on the
He affirmed, that the lands were settled on the Ranee, by the late plea of a
Jadub Sing, the plaintiff's father, in the year 1186, a separation gift from
having taken place between them, from mutual disagreement; and C; judg-
that the Ranee held them from that time. To prove the gift ment given
in his favour, he produced a deed purporting to convey to him for A, it
the Ranee the right of property in the lands, dated the 2d of *Poo* not having
1207. From an *umulnameh*, or order for possession, under date been com-
the 30th *Asarh* 1186, issued by the collector of the district, and petent to C
now produced on the part of the plaintiff, it appeared, that Jadub to alienate
Sing was then finally deprived of his zemindary by order of Go- lands so
demise. held by
her, which
reverted to
A on her
demise.

(a) It may be noticed, that the provisions in section 27, regulation 7, 1799,
against purchases at the public sales in fictitious or substituted names, had
not been enacted when the sale took place, at which Ranee Bishen Kowur
purchased the lands which formed the subject of the present action. But,
independently of this circumstance, both parties in the suit admitted the
right of property to have been vested in the Ranee, and grounded their
respective claims on a title derived from her. It was not therefore a question
before the Courts, whether the Ranee's purchase was valid, or got; but,
supposing its validity, which of the contesting parties was entitled to succeed
to her rights, either by purchase, or inheritance.

1808. **Kishen-mohun Gomen v. Chatter Sing.** vernment, on the ground of contumacy, and his son the plaintiff invested with it in his stead: and the plaintiff proved, by a *purwana* of the collector, dated in 1191, that the zemindary having fallen into arrears, was then taken into the management of the collector, and that lands, of which those in question form a part, were then assigned to the plaintiff. The Zillah Judge, under the contents of the *umulnameh* abovementioned, did not consider Jadub Sing to have been authorized to settle the lands on Ranees Gobindmunees in any part of the year 1186, even allowing him to have done so; and, moreover, it appeared to the Judge, that the settlement of the lands on the Ranees had been made by the plaintiff, as stated by him. And since the Ranees, as holding the lands for a personal maintenance, was considered to have had no power to transfer them, judgment was passed in the plaintiff's favour in the Zillah Court, for the lands, and sum, claimed by him, with costs against the defendant.

The Provincial Court of Calcutta, on appeal to them by the defendant from the above decision, concurred in it, and confirmed it.

On a further appeal by the defendant to the Sudder Dewanny Adawlut (present B. Crisp and J. Fombelle), the respondent exhibited a *purwana*, by the collector of the district, dated in 1191, containing the official order for assigning the lands, of which the disputed mouzas form the chief part, for the maintenance of the respondent, and reciting, that those mouzas were assigned over by the respondent to the Ranees; but without any mention of their having been before assigned to her by Jadub Sing, as alleged by the appellant. The Court did not believe any such assignment to have been made: and, as the lands were evidently a part of the Boggree zemindary, and the appellant, who rested his title to them on a gift from the Ranees, was unable to prove that the Ranees possessed such right in the lands as to authorize her to alienate them; and the lands, having been settled on the Ranees only as a personal maintenance, reverted to the zemindar at her demise; it was finally adjudged, that the respondent was entitled to recover them. Judgment was accordingly passed by the Sudder Dewanny Adawlut, affirming the decrees of the Zillah and Provincial Courts, and dismissing the appeal with costs.

NUNDKOMAR RAI, and RUGHOONUNDUN RAI,
(Paupers), Appellants.

1808.

versus

Dec. 2nd.

RAJINDURNARAEN, Respondent.

THIS was an action brought by the late Ranee Jydoorga in the Zillah Court of Rungpore, on the 22d of April 1802, or 12th of the Bengal year 1209, to recover from Rajindurnaraen the zemindary right of pergunnah Muntuhna, the annual assessment on which was stated at 22,492 rupees. This pergunnah was formerly the zemindary of Nurindurnaraen, the husband of the plaintiff; who died in the Bengal year 1193. The plaintiff stated that it devolved to her at his decease, and remained many years in her possession; that the defendant, who, from his infancy was brought up in her house, had fabricated a deed of gift for the estate, as from her, in his own favour; and, by means of false representations made in her name to the collector of the district, in concert with Gourikaunt Rai, late *gomushta* or manager of her affairs, had contrived to obtain possession. The defendant affirmed, that, after the decease of Nurindurnaraen, he was adopted by the plaintiff, under a written authority for that purpose from her husband; and that, when he became of age, the plaintiff made over the estate to him, by gift. He added, that there had lately been disputes between himself and the plaintiff, in consequence of a refusal on his part to assign to her daughter a share of the estate; but affirmed, that there was no ground to support the present claim. In proof of the gift, and of his having legally obtained possession of the estate, the following documents were adduced by the defendant: 1st, attested copy of a deed of gift by the plaintiff in his favour, dated the 26th of *Phagun* 1206, reciting, that her husband authorized her to adopt a son, as they had no children; that she accordingly adopted the defendant, when an infant; that she was now become infirm from age, and he qualified to manage the estate; and that she therefore made over to him the whole of the property, with a provision that he should maintain her for life. 2d, attested copy of a paper of the same date, entitled *durkhast i kharijee*, addressed by the plaintiff to the collector of the district, representing her adoption of the defendant, and his being qualified to manage the estate; and praying that he might be invested with possession, and his name substituted as proprietor. 3d, *umul-nameh*, or order of the collector, under date the 11th of July 1801, or 29th of *Asarh* 1208, reciting the contents of the plaintiff's petition, and investing the defendant with possession of the estate. On proof of the voluntary execution of the deed of gift, and transmission of the *durkhast i kharijee* to the collector, and consequently of the legal entry of the defendant, the Zillah Judge, considering the estate to have been legally transferred to the defendant, by the gift from the plaintiff, decided, that the plaintiff's claim to recover could not be maintained, and accordingly passed judgment against her, with an injunction to the defendant to afford her a suitable maintenance for life, as provided in the deed of gift.

1808.

Nundkomar
and
Rajindurnarayan.

In this interval the plaintiff died; and Nundkomar Rai and Rughoonundun Rai, alleging themselves to be the heirs of her husband, preferred an appeal as paupers, from the decision passed against her by the Judge of Zillah Rungpore, to the Provincial Court of Moorshedabad. That Court, however, concurred in the decision, and affirmed it, dismissing the appeal.

On a further appeal to the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), this Court observed, that the deed of gift could not establish the title of the respondent, as Ranee Jydoorga was not legally authorized to alien the estate left by her husband, without the consent of his heirs; and that the respondent's title must depend on his having been legally adopted by the Ranee, respecting which no evidence appeared on the proceedings. Evidence was accordingly taken on this point, by order of the Court, which established the adoption of the respondent to have been legally made by the late Ranee, after her husband's death, under a written authority from him for that purpose. On the ground, therefore, of the respondent being legally in possession of the estate, as the adopted son, and consequently heir at law, of the former zemindar, the decrees passed by the Zillah and Provincial Courts against the claim, were affirmed by the Sudder Dewanny Adawlut, with costs against the appellants, in the event of property being found in their possession, and with the usual order, in the mean time (when the judgment is against paupers) that the respondent should advance a fourth of his pleader's fees.

1803.

HEIRS of HEDAYUT OLLAH, Appellants,

versus

Dec. 3rd. HEIRS of ROOPCHUND RAI and KUNWUL LOCHUN RAI,
Respondents.

Claim by A on B and C, for possession of lands, as having been purchased from B, who purchased them from C. B pleads that they were not his to sell; that the sale to himself from C, was conditional, and did not finally take effect. On proof to

THIS action was brought by the late Hedayut Ollah, in the Zillah Court of Rungpore, on the 12th of July 1804, or 30th of *Asarh* of the Bengal year 1211, against the late Roopchund Rai, and Kunwul Lochun Rai to recover a 4 ana share of Chuk Maluncha, &c., as having been purchased by the plaintiff from the defendant Kunwul Lochun, for the sum of 4,260 rupees. It was set forth in the plaint, that this purchase was made by the plaintiff, on the 21st *Aughun* 1210, in the *cutcherry* of the collector of the district; that regular deeds were made out in his name, and a receipt given him for the purchase money, on the part of Kunwul Lochun, who had himself purchased the lands from Roopchund, the other defendant; but that the two defendants had since colluded to defraud him of his purchase; wherefore he sued to be put into possession. It was pleaded in the answer of the defendants, that the purchase stated by the plaintiff could be of no effect; that a previous conditional sale of the lands had indeed been made by Roopchund to Kunwul Lochun, for the sum of 1,975 rupees, and deeds executed on the 11th of *Bysakh* 1208; but that Kunwul Lochun paid, at the time, 875 rupees only of the purchase money, and executed a written engagement to pay the remainder on or before the 11th of *Asin*

1210, on pain of the sale being void and of no effect; that the time expired without payment of the balance; and that Roopchund sued Kunwul Lochun in the Register's Court, on the engagement, and obtained a judgment, declaring the conditional sale ineffectual and void; that, while the suit was depending, Gholam Shah, an officer of the collector, urged Kunwul Lochun to sell the share to him in the *furzee*, or supposed name of Hedayut Ollah; that Kunwul Lochun represented to him the probability of the sale to himself being set aside, as it soon afterwards was, and that he had no power to re-sell the lands; notwithstanding which, he was induced by Gholam Shah to execute a deed of sale to him in the name of the plaintiff, under which deed, void and of no effect, the plaintiff now claimed. The Zillah Judge, on consideration of the case, rejected the plaintiff's claim. There was no doubt of a sale having been made to the plaintiff, of the lands, as the property of Kunwul Lochun, in the collector's *cutcherry*, and that the plaintiff paid the purchase money, 4,260 rupees; but this purchase was held to be of no effect, from its appearing, as stated by the defendants, that the defendant Roopchund had obtained a judgment in the Register's Court against the other defendant, on the written engagement (which was then received in evidence on the admission of Kunwul Lochun), declaring the sale of the lands to Kunwul Lochun of no effect; so that they could not have been legally transferred by sale from Kunwul Lochun to the plaintiff. Judgment was therefore given in the Zillah Court, dismissing the plaintiff's claim to possession of the lands, but directing at the same time, that Kunwul Lochun should refund the purchase money, to the plaintiff, under his receipt for the amount. It was ordered that the defendant, Kunwul Lochun, should pay the costs of himself and the plaintiff; and that the plaintiff should pay those of the other defendant.

On appeal by the plaintiff from the above decision to the Provincial Court of Mooshedabad, that Court concurred in it, and dismissed the appeal, with costs.

On a further appeal preferred by the heirs of Hedayut Ollah to the Sudder Dewanny Adawlut, the appellants maintaining the assertion respecting the collusion of the respondents, and stating that they could prove the payment of the whole purchase money by Kunwul Lochun to Roopchund; the Sudder Dewanny Adawlut called for certain further evidence; and after the receipt of this evidence, (*viz.* the deposition of Kazee Moohummud Sabit, and a receipt from Kunwul Lochun to Roopchund for the purchase money of the lands) the Court, on a consideration of the case, reversed the decrees of the Zillah and Provincial Courts, for the reasons which follow: 1st, a bill of sale for the lands in question from Roopchund to Kunwul Lochun, under date the 11th of *Bysakh* 1208, or 22d of April 1801, and the receipt from the latter, of the same date, both stated the whole purchase money to have been received; and it appeared from the evidence of the *cazee* who attested the deed, that Roopchund then acknowledged the receipt of the purchase money, previously to the *cazee's* affixing his attestation. 2nd, according to a report from the Collector of Rungpore, relative to the circumstances attending the purchase of Hedayut Ollah, it appeared, that

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Heirs of
Hedayut
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Heirs of
Roopchund
Rai and
Kunwul
Lochun
Rai.

Kunwul Lochun, having made away with stamped paper entrusted to his charge, to the value of 16,000 rupees, was apprehended at the instance of the Collector, and called on to give in a list of his property, to be sold for making good the balance; that, among other property, he gave in the lands in question as his own; that they were advertised for sale as such, with the knowledge of Anoopchund, the brother of Roopchund (and a party to the transaction) and of Ramchunder Bose, Roopchund's *mokhtar* or confidential agent, without any objection, or claim to the lands on behalf of Roopchund, being made by those persons; and that they were both among the bidders for the lands when they were put up for sale and purchased by Hedayut Ollah, for the sum of 4,269 rupees, as stated by him; and that no mention was then made to the Collector of there being any conditional engagement from Kunwul Lochun, or of Roopchund's disputing his title to the lands under the previous conveyance. 3d, it was clear that the lands were sold to Hedayut Ollah as the property of Kunwul Lochun, to raise part of the balance due from him on account of the stamps, and that the deeds of conveyance, as produced in Court, were given in Kunwul Lochun's name; and there was proof that the title deeds in the former transaction remained all along in possession of Kunwul Lochun, whereas, had the sale to him in reality not taken effect, it was not probable that such would have been the case. Moreover, from the contents of a private letter from Anoopchund to Kunwul Lochun filed in the former suit before the Register, relative to money due from Kunwul Lochun to the writer of the letter and to Roopchund, bearing date after the expiration of the period specified in the engagement, it was inferrible, that the sale to Kunwul Lochun was then final and concluded. Under these circumstances, the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle) considered the alleged engagement of Kunwul Lochun, and the action brought on it in the Register's Court, to have been collusive, and pronounced them of no effect against the ascertained right of the late Hedayut Ollah to the lands, by the purchase from Kunwul Lochun, under which he claimed in the present case. Judgment was therefore passed by the Sudder Dewanny Adawlut, reversing the decrees of the Zillah and Provincial Courts, and adjudging possession of the lands to the appellants, as heirs of Hedayut Ollah; with mesue profits since the date of the sale. The costs in each of the Courts were made payable by the respondent.

BISHEN SHAHI, (Pauper,) Appellant,

versus

URMURDUN SING, Respondent.

1808.

Dec. 3rd.

THIS was an action brought by Bishen Shahi in the Zillah Court of Goruckpore, on the 27th of April 1803, or 20th *Bysakh* of the *Fuslee* year 1210, to recover from Urmurdun Sing the talook of Bishenpore, situated in pergunnah Seidhoo-jobna. The annual produce was stated at 5,197 rupees. It was set forth in the plaint, that the talook in dispute was the plaintiff's hereditary property; that, in 1198, Futih Shahy, the defendant's father, in collusion with the *tehsildar* of the pergunnah, caused a sale of the lands to be made to him, as for arrears of revenue; that afterwards, on an investigation of the matter at the instance of the plaintiff, the sale had been rescinded, and *purwanas* issued for the plaintiff's being reinstated; notwithstanding which, the defendant still kept possession. The defendant stated, that the talook had been regularly sold to his father in the year 1791, under the government of the Nawab Vizier, in consequence of the plaintiff's not making regular payment of his revenue; and that, from that time to the present, a period of fourteen years, the defendant and his father had been in possession under the sale abovementioned, which, he would show, was conclusive. A deed of public sale, denominated *bye sultance*, dated the 10th of *Cheit* 1198, under the seal of Sheikh Durgahy, *tehsildar* of the pergunnah on the part of the Nawab Vizier, selling the talook in dispute to the defendant's father for 3,000 rupees (the revenue of one year), was produced in Court by the defendant; and it was proved by his witnesses, that this sale was officially made to the defendant's father at a time when the plaintiff had absented himself, and was in arrear for a year's revenue of the talook; and that the defendant and his father had been in possession under this sale ever since. The plaintiff exhibited a document termed *rud nameh*, or deed rescinding the sale, purporting to have been obtained from an officer of the *chukladar*, or superintendent of the district, about a year after the date of the sale; as also *purwanas*, ostensibly in consequence of the above deed, directing the plaintiff to be reinstated. These had clearly never been acted on; yet there appeared no reason why, if they had been of any authority, they should not have been carried into effect at the time. The defendant affirmed them to have been obtained by collusion with the officers of the *chukladar*; which the Zillah Judge presumed to have been the case; especially as clear grounds were shown to have existed for the lands being sold, but none for the sale being rescinded. As there was proof of the sale, and of the purchase money (an adequate consideration) having been paid by the defendant's father; and also of possession having been held, under the sale, until the date of the action; and as it appeared to have been a regular sale for arrears of revenue, and the official act of an officer under the government of the Nawab Vizier, such as, by the second clause of section 18, regulation 2, 1803, is declared not open to the cognizance of the civil courts established under that regulation; the Zillah Judge pronounced the defendant to be

1808. rightfully in possession under the sale, and dismissed the plaintiff's claim.

Bushen
Shahli, v.
Umurduu
Sing.

On appeal by the plaintiff from the above decision to the Provincial Court of Benares, and finally to the Sudder Dewanny Adawlut (present B. Crisp and J. Fombelle), those Courts concurred in the judgment passed against the plaintiff, and respectively confirmed it.

1808.

WUJUH ON NISA KHANUM, Appellant,

versus

Dec. 30th.

MIRZA HUSUN ALI, Respondent.

Claim by one of the heirs of a person deceased, for a share of his estate, against his widow, who took the whole estate in satisfaction of dower. The principal ground of the claim, viz. that the amount of the dower, which absorbed the whole estate, was excessive, and therefore illegal, rejected by the Sudder Dewanny Adawlut; and judgment given dismissing the claim.

THIS action was brought by Mirza Husun Ali in the Zillah Court of Tippera, on the 17th of January 1794, or 7th of *Bysakh* of the Bengal year 1200, to recover, as one of the heirs of the late Mirza Ali, husband of the defendant Wujih on Nisa, a 4 ana, 7 gundas, 3 cowries share of pergunnah Buldakhah. The annual assessment on the share claimed was stated at 16,690 rupees. The defendant's husband had been proprietor of 8 anas of the above pergunnah, which share, on his decease, was taken possession of by his widow, the defendant. She stated herself to have succeeded to it in satisfaction of dower, to the amount of 114,000 rupees, and 355 gold mohurs, settled on her by her late husband, at her marriage; and pleaded, that no claim would lie on the part of the plaintiff as an heir. The *kabeen nameh*, or deed of marriage settlement, as produced by the defendant, was dated the 22d of *Jumadossani* of the *Hijera* year 1186, or 26th of September 1772, and specified the above amount as unconditionally settled on her. The plaintiff admitted the execution of it, but denied its legality, on the ground of the amount being excessive. The defendant also produced a written engagement of the plaintiff, the date of it corresponding with the 5th of May 1785, in which the plaintiff agreed with the defendant to be *serberakar* or manager, on her part, of the 8 ana zemindary. The Zillah Judge, on a reference to his Moohummudan law officer, received an opinion, that the right of dower precedes right of inheritance; that, if the dower of the wife exceed the whole estate left by the husband, his heirs have no claim at law. On the ground of this opinion, and of the plaintiff's appearing, as implied in his engagement, to have acknowledged the plaintiff's right to the estate; the claim was dismissed in the Zillah Court, with costs.

On appeal by the plaintiff to the Provincial Court of Dacca, that Court considered the amount of dower specified in the deed of settlement to be only nominal, and held (though against the opinion of their law officer) that the amount, as being excessive, should be modified, and a suitable amount only (*mehri-misal*) allowed to the widow. The law officer was referred to by the Provincial Court, to specify the distribution of the estate of Mirza Ali, among all the ascertained legal heirs. His answer was, that, after the performance of all obligations preferable to the right of inheritance, such

as funeral charges, debts, and legacies to the amount of a third; the estate of Mirza Ali would be divisible into 5,832 parts, in the following manner; viz. 185 to the widow; 1,026 to the brother, Mirza Husun Ali; 405 to the sister; 648 to the husband of the 2nd daughter; 979 to the husband of the 3d daughter; 462, each, to two sons of the third daughter. Judgment was passed by the Provincial Court, reversing the decree of the Zillah Judge, and directing, that the claimant and the other heirs should receive the shares due to them according to the above distribution. The costs in the Provincial Court were made payable by the respective parties.

1808.

Wujih-on
Nisa
Khanum, v.
Mirza
Husun Ali.

On an appeal preferred by the widow from the above decision to the Sudder Dewanny Adawlut, her pleas were: 1st, that, though the respondent called himself a *Soonee*, his family were Moohummudans of the *Sheea* sect, according to the code of which sect, if there be a widow, or daughter, a brother cannot succeed as heir; that, according to the law of both sects, apostacy from the Moohummudan faith, which was the case with the respondent, as shown by his paying worship to Hindoo idols, precluded all right of inheritance; that, as the amount of her dower absorbed the whole estate left by her husband, she had legally succeeded to the whole of it, taking upon herself her husband's debts. The respondent, on the other hand, insisted on the illegality of the dower, and his right as an heir. To determine the law of the case, the following questions were proposed by the Sudder Dewanny Adawlut to their Moohummudan law officers: 1st, is the deed of settlement, made in favour of the appellant by her late husband, valid or otherwise? and was the sum specified in it recoverable on the death of the husband, from his landed and other property, in preference to hereditary claims? and, if the amount of the dower absorbed the whole estate, was the widow, taking upon herself the debts of her husband, at liberty to take the whole estate in satisfaction of her dower? 2nd, if the deed of settlement be not valid, has the respondent a right by inheritance to any of the property of his deceased brother, under the *Soonee*, or the *Sheea* code? and what will be the distribution among the heirs, according to the law of either sect? 3d, if, according to the statement of the appellant, the respondent, after his brother's death, deserted the Moohummudan faith, is he, or not, on that account, precluded by law from being an heir of his brother? The answers to these questions, given by the law officers, were as follow: 1st, the deed of settlement, if the execution of it have been proved by evidence, is good in law. An excess of dower, though perhaps improper, is not prohibited by law. The amount of the dower is recoverable from the real and personal property left by the husband, in preference to the claims of heirs. Whether the dower absorb the whole estate, or not, landed or other immoveable property cannot be taken by the widow, in satisfaction of dower, without consent of the heirs, or permission of the ruling power; but she may obtain it as an equivalent for her dower, by that permission, or by consent of the heirs: moveable property she may take unconditionally. In the present case, the fact of the respondent having accepted from the appellant the management of the estate of Mirza Ali, and paid her the profits; and his not

1808. having come forward to pay a portion of a debt decreed against the estate of the husband (in the cause of Khoja Aratoon), which debt was paid by the appellant, under the decree; imply a recognition, by the respondent, of the appellant's right to the estate in satisfaction of her dower. 2nd, if the deed of settlement be invalid, (or, in fact, whether it be valid or invalid, though, in the former case, there will be no assets remaining), according to the *Soonee* code, the respondent, as the brother of the deceased, is entitled to inherit as a collateral, after the lineal heirs: by the *Sheea* law, the brother does not come in for any thing, if there be a daughter; the widow and daughter living together, get the estate. 3d, if the apostacy of the respondent from the faith took place, as would appear from the question proposed, after the death of his brother, the respondent is, notwithstanding, an heir, because, at the time when his brother died, and his right as an heir arose, he was of the faith which his brother professed, and had incurred no legal disability to inherit. As, according to the above *fatwa* the large amount of the dower did not render it illegal; and as the consent of the heirs, required to authorize the appellant's taking the landed estate as equivalent for the amount of her dower, was implied by the circumstance of the other heirs not having made objections to her taking possession, and by the respondent's having been manager of the estate on her part for eleven years, during which she had held it before the date of the present suit; the Court held the appellant to be entitled to the whole estate, and the claim advanced by the respondent to be inadmissible. Judgment was accordingly passed by the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), reversing the decree of the Provincial Court, and dismissing the claim of the respondent, with costs payable by him in each of the Courts. (a)

(a) The *fatwa* of the law officers of the Sudder Dewanny Adawlut, and decision of the Court, establish the following points relative to the Moohumudan law of dower: 1st, that the dower due to a widow, on her husband's death, is payable from his estate in preference to all claims of inheritance: 2d, that landed, or other immoveable property, left by the husband, cannot be taken by the widow in satisfaction of her claim of dower without the consent of the heirs, or competent judicial authority; but that immoveable property may be taken by her, as far as the heirs are concerned, but not to the prejudice of other creditors, in payment of dower indisputably due: 3d, that one of the husband's heirs having for several years acted as a manager for his widow, who had taken possession of her husband's landed estate, in satisfaction of her dower, whilst none of the other heirs preferred any claim to the estate, may be considered as sufficient evidence of consent on the part of the heirs, to the widow's right. It may be added, as another point declared by the *fatwa* of the law officers (besides the distinction noted between the *Soonee* and *Sheea* law, with respect to the rights of collaterals, when there are any lineal heirs) that apostacy from the Moohumudan faith, if subsequent to the devolution of any hereditary property, does not deprive the apostate of the right of succession.

RAM PURSAUD LUSKER and GOCOOL LUSKER,

1809.

Appellants,

versus

Jan. 30th.

RAM SOONDER GHOSE, Respondent.

THIS was an appeal from a decision of the Provincial Court of Calcutta, confirming a dismissal on default, passed by the Judge of the Twenty-four Pergunnahs, in an appeal before him, from a decree of his Register.

The appellant being dissatisfied with a decree of the Register of Zillah Hoogly, dated 1st of January 1805, adjudging him to pay the sum of 266 rupees, principal and interest, appealed to the Zillah Judge. After the transfer of part of Zillah Hoogly to the Twenty-four Pergunnahs, the Judge of the latter Zillah, on the 6th of May, 1805, dismissed the appeal, on default of appellant's attendance to prosecute it. The appellant not being satisfied, appealed under section 9, regulation 2, 1801, to the Provincial Court of Calcutta. On the 24th of January 1808, that Court, by an order, setting forth, that on examination of the papers, it appeared that the appellant had not attended the Zillah Court to prosecute his appeal, or shewn any sufficient cause for his neglect to do so, confirmed the order of the Zillah Judge. The appellant then petitioned the Provincial Court, for a further appeal to the Sudder Dewanny Adawlut, and it appearing to the Provincial Court, that, under section 8, regulation 2, 1801, which provides for "an appeal to the Sudder Dewanny Adawlut, in all cases wherein an appeal may lie under the existing regulations to a Provincial Court, and that Court may have refused to admit the appeal on the ground of delay, informality, or other default in preferring it; or after having admitted the appeal, may dismiss it on the ground of some default without investigation of the merits of the cause," the appellant was entitled to a further appeal, they forwarded a certified copy of their proceedings to the Sudder Dewanny Adawlut, by whom the appeal was admitted, in ordinary course, on the 22d of April 1808. But when the case was brought forward for trial, it appearing that the Provincial Court, after hearing both parties for and against the dismissal ordered by the Zillah Judge, had approved and confirmed such dismissal, the Court of Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), did not consider a further appeal to be within the intention of the section and regulation above quoted; and therefore ordered that proceedings should be discontinued in this Court, and the decree of the Provincial Court be left in full force and effect. (a)

(a) This case is reported, as relating to a construction not generally understood, of section 8, regulation 2, 1801, which is equally applicable to section 9, of that regulation, providing for an appeal to the Provincial Courts in cases of dismissal, on default by the Zillah and City Courts.

These sections have indeed been rescinded by the first clause of section 3, regulation 26, 1814; but similar provisions are still in force under the second and third clauses of the section last mentioned.

1809.

RAMGUNGA DEO, Appellant,

versus

Mar. 24th.

DOORGAMUNEE JOBRAJ, Respondent.

In a suit against the son of the late Rajah of Tipperah, for the succession to the Tipperah zemindary, there being proof that by the usage of the family the person appointed *Jobraj* is successor to the zemindary in preference to the next of kin, such usage upheld by the court of Sudder Dewanny Adawlut, in conformity with an opinion given by their *pundits* as to its legality, and judgment passed for the plaintiff. The zemindary, not liable to division under section 2, regulation 10, 1800.

THIS action was brought by Doorgamunee Jobraj, in the Provincial Court of Dacca (under the special provisions of section 6, regulation 5, 1793), on the 12th of August 1805, or 29th of *Srawun* of the Bengal year 1212, to recover from Ramgunga Deo, the raj and zemindary of Chuckla Roshunabad, the annual produce of which was stated at 168,000 rupees.

The zemindary claimed by the plaintiff, and situated within the territories of the Company, formed part of the possessions of the zemindars of Tipperah, who are also Rajahs of a territory on the hills bordering on Tipperah, independent of the Company's authority. The succession to the whole was disputed; but the present suit of course related only to that part of it (*viz.* the zemindary above stated), which was subject to the jurisdiction of the Provincial Court.

It was set forth in the plaint, that according to the usage of the family, on the death of the Rajah for the time being, he is succeeded in the raj and in the zemindary in contest, by the person holding the title and office of *Jobraj*, or in default of such, by the person next in rank, designated *Burra Thakoor*; that in 1780, on the death of the then Rajah Kishen Manic, there being no *Jobraj* or *Burra Thakoor*, his second son, Rajdhur Manic, succeeded to the raj and zemindary, with the sanction and authority of the British Government; that Rajdhur Manic, according to the custom of the family, immediately appointing a *Jobraj*, raised the plaintiff to that office, when 7 years of age; that, on the death of the Rajah, in January 1804, the plaintiff was entitled to succeed as *Jobraj*; and that he accordingly sued to recover the zemindary from the defendant.

The defendant, who was the eldest son of the late Rajah, did not admit the existence, or validity, of the usage alleged by the plaintiff, as determining the succession of the *Jobraj*, and rested his title on having regularly succeeded as the legal heir, in conformity with the custom of the family, and with the laws of inheritance established in the Company's territories.

After consideration of the documents and evidence brought forward in the case, there was a difference of opinion in the Provincial Court. The Third Judge considered the defendant, as son, to be entitled to succeed according to the established law of inheritance. The First and Second Judges considered the plaintiff, as *Jobraj*, entitled to succeed to the raj and zemindary, by the usage of the family, and that the whole of the heirs of Rajah Kulleean Manic, a remote ancestor of both the parties, were entitled to share the profits. Judgment was consequently passed in the Provincial Court, according to the voices of the two Senior Judges; with costs payable by the parties respectively.

An appeal was preferred by the defendant to the Sudder Dewanny Adawlut, chiefly on the following pleas; first, that an usage, to establish a title of succession, must be uniform, which, it was in-

sisted, was not the case, with respect to the succession of the 1809.
Jobraj; second, that the plaintiff had no title at all by inheritance, --
 and that the zemindary was not liable to division, under regulation Ramgunga
 11, 1793, as, with respect to the produce of it, had been adjudged Deo, v.
 by the Provincial Court. Doorga-
 muneo
Jobraj.

According to the evidence in the case, and the genealogical tables delivered by the parties, the persons who had held the raj and zemindary since the time of Rajah Kuleean Manic, the common ancestor of the parties (who died about a century ago,) appeared to the Sudder Dewanny Adawlut, to have been as follows; 1st, at the death of Kuleean Manic, his son, Govind Deo Thakoor, whom he had appointed *Jobraj*, succeeded to the raj and zemindary, by the title of Govind Manic. 2nd, on the death of Govind Manic, his son Ram Deo Thakoor, whom he had appointed *Jobraj*, succeeded, by the title of Ram Manic. 3d, after Ram Manic, his son Ruttun Deb Thakoor, appointed *Jobraj* by him, succeeded, by the title of Ruttun Manic. 4th, Ruttun Manic was murdered after some years, by his brother Ghunsam Thakoor, who assumed the succession, by force, by the title of Mahinder Manic. 5th, on his demise, Doorga Muneo Thakoor, the brother of Rajah Ruttun Manic, appointed *Jobraj* by him, succeeded by the title of Dhurm Manic. 6th, at the death of Dhurm Manic, who left two sons, Gungadhur Thakoor and Gudadhur Thakoor (the latter, grandfather of the respondent), his half-brother Chunder Muneo Thakoor (great grandfather of the appellant), succeeded, as having been appointed *Jobraj* by Dhurm Manic, under the title of Mokoond Manic. 7th, at his death, notwithstanding Gungadhur Thakoor, the eldest son of his half-brother Dhurm Manic, had been appointed by him *Jobraj*, Rooder Muneo Thakoor, great grandson of Jugurnauth Thakoor, second son of Rajah Kuleean Manic, forcibly assumed the succession, by the title of Jy Manic. 8th, Punj Kouree Thakoor (eldest son of Rajah Mokoond Manic,) displaced the above Jy Manic, and assumed the raj and zemindary by means of a *sunnud* obtained from the Nawab of Moorshedabad, under the title of Indur Manic. 9th, after some years, Indur Manic being confined at Dacca, Gungadhur Thakoor, the person appointed *Jobraj*, by Rajah Mokoond Manic, (as mentioned above) obtained a *purwanah* from the Nuwab of Dacca, and became rajah and zemindar by the title of Oodye Manic. 10th and 11th, after his death, Horea Thakoor, under the designation of Rajah Bijee Manic, and Bunmallee Thakoor, under that of Lukhee Manic, successively held the raj and zemindary by force, until at length; 12th, Kishen Muneo, the *Jobraj* appointed by Rajahs Indur Manic and Oodye Manic, obtained the raj and zemindary, by the title of Kishen Manic, under a *sunnud* from the Nawab Nasir Jung. 13th, at the decease of Kishen Manic, Huree Muneo Thakoor, his brother, appointed by him *Jobraj*, had died; and Birissur Manic, uncle of the respondent, who had been appointed by Kishen Manic to the office of *Burra Thakoor*, was apparently entitled to the succession under that title, but died in a few months. After this, Rajdhur Muneo Thakoor, the younger of the two surviving sons of the deceased, Huree Muneo, in pursuance of a petition from the widow of Rajah Kishen Manic, and

1809. of a report from the resident at Tipperah, (reciting that the late
 Rangunga Den, v. Doorga-munee Jobraj. Rajah appeared to have designed Rajdhur Munee for his successor, and that, at all events, as the person who had claimed as *Burra Thakoor*, was dead, there was then no other claimant), obtained, in 1785, with the sanction of Government, the raj and zemindary, by the title of Rajdhur Manic; although his elder brother, Huree Munee Thakoor, was then living, but absent. Rajdhur Manic appointed the respondent (great grandson of Dhurm Manic,) to the office of *Jobraj*; and the appellant, his own son, to that of *Burra Thakoor*.

According to the above recital of persons who had held the raj and zemindary, the Court observed, that the person appointed *Jobraj* by the Rajah for the time being, if alive at the time of the Rajah's demise, appeared to have regularly succeeded, unless prevented by force, or other undue means; and the Court therefore assumed, that, by the custom and usage of the family, the *Jobraj* was successor to the Rajah. To determine the Hindoo law, with reference to such custom, the Court, after delivering the genealogical tables into the hands of their *pundits*, proposed to them the following questions:

1st, What is implied by the word *Jobraj*? And to whom does the *Shaster* apply that term?

2nd, If it be the custom of a Hindoo family, possessing a raj and zemindary, that the Rajah, on succeeding to the raj, appoint one of his relatives to be *Jobraj*: and that, on the demise of the Rajah, the person so appointed *Jobraj*, succeed to the raj and zemindary; is such a family custom repugnant, or not, to the Hindoo law of Bengal?

3d, If, in a family in which the custom above mentioned has existed for generations, Rajah Rajdhur Manic (whose grandson, Mokoond Manic, after the death of his elder brother Dhurm Manic, notwithstanding that Dhurm Manic left sons, succeeded to the raj and zemindary, as being *Jobraj*, according to the custom of the family), on his accession to the raj, appointed Doorga Munee (the respondent), great grandson of Dhurm Manic to be *Jobraj*; and afterwards appointed his own son Rangunga Deo (the appellant) to be *Burra Thakoor*; under such circumstances, according to the law, as well as the custom of the family, whether had Doorga Munee the right to the raj and zemindary, as *Jobraj*, on the demise of Rajdhur Manic, or Rangunga Deo, as son and heir of the last Rajah?

The answers delivered by the *Pundits* were as follow; 1st, the term *Jobraj* implies *young Rajah*. The son of a Rajah may be constituted *Jobraj*, on performance of certain ceremonies prescribed by the *Shaster*, and the term be applied to him, in its literal meaning. A Rajah's brother, or other relative, may also be constituted *Jobraj*, with the ceremonies above alluded to; and the term, as applied to the latter, is in a sense which usage has given it. 2nd, if a Rajah, on his succession to the Raj of his family, constitute one of his near relations *Jobraj*, such person, as *Jobraj*, succeeds the Rajah at his demise. The custom is legal, in families where it has subsisted for generations, according to the authorities of Hindoo law current in Bengal. 3d, on the demise of the Rajah,

a near relation succeeds, as *Jobraj*, even though there be a son of the deceased. The custom, specified above, having existed in the family of the parties for many generations, Doorga Munee, on the death of Rajah Rajdhur Manic, was entitled to succeed as *Jobraj*; and Ramgunga Deo, as the son, had no title to the succession. 1809.
Ramgunga
Deo, v.
Doorga-
munee
Jobraj.

On consideration of the above answers of their *Pundits*, the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle) held, that the respondent, according to the custom of the family, sanctioned by the Hindoo law, was the rightful successor, as *Jobraj*, to the late Rajah. The Court observed, that, not to adhere, in the present instance, to a custom, by virtue of which Mokoond Manic, the ancestor of the appellant, succeeded, as having been appointed *Jobraj* by Rajah Dhurm Manic, to the exclusion of the sons of that Rajah (from whom the respondent is directly descended), would be unjust to the respondent; and it appeared to the Court presumable, that the late Rajah, Rajdhur Manic, who, knowing the custom of the family, appointed the respondent *Jobraj*, and afterwards nominated his own son the appellant to the inferior office of *Burra Thakoor*, must have intended that the respondent should succeed him. Accordingly, it being determined by the Court that the respondent, at the demise of the late Rajah, was entitled to the zemindary, and had been illegally kept out of possession by the appellant, it was adjudged, that he should recover the zemindary, with mesne profits, since the date of the late Rajah's demise. But as, according to established usage, and under the provisions of section 2, regulation 10, 1800, the zemindary is not liable to division, that part of the decree of the Provincial Court, which directed the profits to be divided among the surviving heirs of Kuleean Manic, was reversed; provision being at the same time made in the judgment of the Sudder Dewanny Adawlut, that respondent should hold the zemindary, subject to the usual charge for maintenance of members of the family, and other established disbursements. Costs in both Courts were made payable by the appellant. (a)

(a) The principle of this decision corresponds with the rule prescribed in section 2, regulation 10, 1800, that "regulation 11, 1793, shall not be considered to supersede or affect any established usage, which may have obtained in the Jungle Mehals of Midnapore, or other districts, by which the succession to landed estates, the proprietor of which may die intestate, has hitherto been considered to devolve to a single heir, to the exclusion of the other heirs of the deceased. Regarding the appointment of a *Jobraj*, as a virtual devise of the succession, the decree in this case may also be considered within the spirit of section 6, regulation 11, 1793, which allows any actual proprietor of land to bequeath, or transfer his or her entire landed estate, to one or more persons, in exclusion of all others, by will, or other writing, or verbally; provided that the bequest, or transfer, be not repugnant to the regulations of the British Government, nor contrary to the Hindoo or Mooohummudan law.

1809.

May 8th.

RAJAH GRIESCHUND, Appellant,

versus

MUHARAJA TEZCHUND, Respondent.

In suit for alluvion land, which had accumulated on the estate of the plaintiff by the gradual recession of a river that to the plaintiff's estate, and left united to that of the defendant, by the sudden return of the river to its former course, the Sudder Dewanny Adawlut disallowed the claim of plaintiff.

THE parties were zemindars, whose estates lay on the opposite banks of the river Hooghly; having that river for their common boundary. The lands of the appellant lay on the north-east side of the said river in Zillah Nuddea, and those of the respondent on the south west side, in Zillah Burdwan.

The action was brought by the respondent in the Zillah Court of Nuddea, on the 14th of February 1803, for obtaining possession of 4,500 beegas of alluvial land, the yearly produce of which amounted to 4,500 rupees.

The plaintiff set forth that the zemindary of the plaintiff, and that of the defendant, were separated by the river Hooghly, which had been immemorially taken as the boundary between their respective estates. That the said river had from time to time encroached, sometimes on the one, and sometimes on the other shore, on which occasions each party took possession of the soil which attached to his bank, according to the custom acknowledged and acted on through the country, with respect to alluvial lands. That some years since the south side, on which is the property of the plaintiff, gained a considerable accession of soil, which as it became of a consistency to bear cultivation, was taken possession of by the plaintiff. After a time the river, making a sudden irruption to the southward, returned to its former channel, and divided the new land bodily from the main land of the plaintiff's estate. Whereupon the defendant, whose estate lay along the north side of the river, took possession of the said new ground, so divided, affirming, that the river, having immemorially been, and taken to be, the boundary of the two estates, all that was found to the northward of the said river belonged of right to him. The defendant in his answer allowed the general statement, and the possession of the plaintiff in the increment, before the return of the river to its original channel, and grounded his defence on the immemorial usage of alluvion which had obtained between the parties and their ancestors, whereby the current of the river, bounding their respective zemindaries, had been the invariable limit between them. The defendant therefore contended that as the plaintiff possessed the increment which accumulated on his shore, when the river encroached northward, by the same right, did he, the defendant, hold the land, now, that by the southing of the river, it had become on his side.

To this the plaintiff replied, that a difference must be taken between the two cases where a river gradually encroaches upon one side, and recedes from the opposite side; and where a river, quitting its bed, makes an irruption into the possession of one party, and divides off a portion unbroken and capable of being identified, in which latter case *constat manus*, and thereupon the parties joined issue.

The evidence established, that the plaintiff's estate received a

considerable accession of soil, of which the plaintiff took possession by doing such acts as the premises admitted, namely, ^{grazing} cattle and cutting firewood. That during the period of this accession on the plaintiff's side, the river continued edging northward, and encroaching on the land of the defendant; but suddenly returning to its former channel to the southward, divided the whole newly acquired tract from the main land of the plaintiff's estate. Whereupon the defendant took possession of it. 1809.
Rajah Grieschund, v. Muhareja Tezchund.

The Zillah Judge considering that under the general usage of alluvion, the plaintiff had established his right, on the 7th of May 1804, gave a decree in his favour, with costs; which was affirmed also with costs, on appeal to the Provincial Court, by their decree of the 8th of May 1806. The cause of action was not such as to make it regularly appealable to the Sudder Dewanny Adawlut. But the appellant applied to the Court for a special appeal, which was granted on the 7th of January 1807, with reference to the nature and importance of the case, as connected with the law of alluvion.

In the petition presented by the appellant to the Sudder Court, he admitted the general usage of alluvion, as held by the Zillah and Provincial Courts; but averred, that it was not applicable to the particular case. For, he insisted, that the land was allowed to be increment of alluvion; and the only distinction affirmed was that it accumulated insensibly, on the bank of the respondent, in the gradual progress of the river to the northward; but was bodily divided from the said bank on the return of the river *uno impetu* to the southward; whereupon the respondent claimed, that, being recognizable, the property remained with him, and the Courts so decreed: whereas the disputed land being increment of alluvion, and the river being the established boundary between the estates of appellant and respondent with respect to all such lands, the disputed ground, situated on the appellant's side of the river, since its return to the old channel, was consequently his property.

The Court of Sudder Dewanny Adawlut (present J H. Harington and J. Stuart) on consideration of all the facts and circumstances of the case, with the local usage of alluvion, admitted by the parties, did not judge the right of the respondent, who was the original plaintiff, to be established. Both parties admitted that according to prescriptive usage, respecting alluvion or deluvion from the river which intersected their respective zemindaries, the stream of this river was the mutual boundary of their estate. Under this usage, the contested alluvion land, formed by encroachments of the river on the estate of the appellant, had for some years been possessed by the respondent, and a return of the river to its former channel had now re-annexed it to the estate of the appellant. The river in its sudden return to the southward having divided off the new land alone, without any part of the main land of the respondent's zemindary, the circumstance of the re-attachment to the appellant's estate having taken place bodily, not by disappearance and re-accumulation, did not appear to the Court sufficient to defeat the right of the appellant, on principles of equity, and a just application of the usage of alluvion. Nor was the respondent able to prove any precedent in support of his claim to the land

in dispute. The Court of Sudder Dewanny Adawlut accordingly reversed the decrees of the Zillah and Provincial Courts with costs. (a)

1809.

May 19th.

OMDUTON NISA BEGUM, (Pauper), Appellant,

versus

MIRZA ASUD ALI, Respondent.

In a suit by a wife against her husband, both of the *Sheea* sect of Moohum-mudans, for the amount of her dower. It appearing that 500 rupees was verbally specified at the reading of the ceremony in the *Sheea* form, but that a deed of settlement was executed by the husband for 100,015, adjudged that the sum specified in the deed was the sum legally demandable.

THIS action was brought by Omduton Nisa Begum, against her husband Mirza Asud Ali, in the City Court of Patna, on the 29th of September 1798, to recover the sum of 20,000 rupees, in part of 100,015 rupees, stated to have been settled on her by the defendant at the time of their marriage, as specified in a deed of settlement produced by the plaintiff, bearing date 4th of *Rujub* of the *Hijera* year 1207, corresponding with the 12th of February 1793.

The defendant, after denying in general terms the validity of the claim, set forth in his answer, that he and the plaintiff were of the *Sheea* sect; that their marriage was celebrated with a dower of 500 rupees, according to the law and usage of that sect; that the deed of settlement for 100,015 rupees, was merely a matter of form, executed by every one who married, in compliance with the custom of the district, but not intended to be of any effect. The answer further averred, that dower was not demandable except on the death of the husband, or on divorce, neither of which was the case in the present instance; that the plaintiff moreover was living with her mother, and denied access to the defendant, her husband, whereby, independently of other grounds, her dower was forfeited.

As the parties were *Sheeas*, and it appeared from the testimony of witnesses examined in the case, that the *Sheea* ceremony was read to the parties at the marriage, and that the sum of 500 rupees was verbally declared to be the dower by the priest, at the performance of the ceremony, in conformity with the *Sheea* usage; and as the majority of five law officers of the Zillah Courts in the Province of Behar, gave *futwas* maintaining the legality of the dower at 500 rupees, in preference to that specified in the deed of

(a) It is material to note, in this case, that the land adjudged to appellant was alluvial land, formed by a prior encroachment of the river on appellant's estate; at that time joined by gradual accession to the estate of respondent, and subsequently re-annexed to that of appellant by the sudden return of the river to its former channel. Had the river, by a sudden change of its course, intersected the old land of respondent's zemindary, leaving each bank still capable of being identified as the estate of respondent, the general law of alluvion, in India, as well as in Europe, would not have entitled appellant to the land situate between the new and old channel of the river; and the local usage admitted by the parties with respect to *Shekust Pygwast*, (literally broken and joined) or alluvial land, properly so called, viz. that the river flowing between the two estates should form their mutual boundary, could not have been available to appellant, as constituting a title to land not gained by alluvion. It may be added, that in the common case of alluvion, or increment by the recess of a river, or the sea, the Indian law and usage correspond with those of England, and with the civil law. What is gained by gradual accession is the property of him to whose estate the recess of the river or sea has annexed it. What is lost by the gradual encroachment of a river, or the sea, is a loss, without reparation, to the owner whose estate is thus destroyed.

settlement, (prepared according to the law and usage of the *Soonee* sect, generally prevalent throughout the provinces under the Bengal Government) and stating it recoverable immediately: the Zillah Judge, considering this sum only to be due, as dower to the plaintiff, passed a decree for her recovering it from the defendant.

1809.

Omduton
Nisa Re-
gum, v.
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Ali.

On appeal by the plaintiff from the above decree to the Provincial Court of Patna, that Court took a *futwa* from their law officers. It appearing from that *futwa*, that the *Sheea* ceremony had been performed, with a dower of 500 rupees, verbally declared by the priest at the time, the written deed of settlement was considered inadmissible, and the Provincial Court of Appeal affirmed the judgment of the City Court, and dismissed the appeal.

After a further appeal had been preferred by the plaintiff to the Sudder Dewanny Adawlut, the defendant died; and the cause was left depending between the plaintiff, and the heirs of the defendant. The Court, after considering the proceedings held in the cause, proposed the following questions to their Moohummudan law officers; 1st, is the amount of dower limited by law, or not? 2d, in what manner is dower payable? Is the payment delayed till the death of the husband, or divorce? And is the sum specified in a deed of marriage settlement, actually demandable, or not? 3d, if the marriage ceremony be performed, with a verbal specification of 500 rupees, as dower, at the time; and, in a deed of settlement, the dower be specified at rupees 100,015; is the latter sum the legal amount of the dower, or not? 4th, if a wife be in her mother's house, separate from her husband, and do not allow her husband access when he pleases; is the dower thereby forfeited or not? 5th, the husband and wife, (original plaintiff and defendant in this cause) call themselves *Sheeas*; and Meer Mohsin Ali, one of the plaintiff's witnesses (whose deposition was taken in the Zillah Court) deposes, that he read the ceremony; that 100,015 rupees was the sum agreed on by the parties as the amount of dower, according to the usage of the *Soonee* sect, and the agreement reduced to writing; that, of the above sum, he announced at the ceremony only 500 rupees as dower, both of the parties being *Sheeas*, from respect to the *Sheea* doctrine; under these circumstances, what amount of dower is legally demandable? If, in any of the points stated, there be a difference between the law of the *Soonee* and *Sheea* sects, such difference should be stated: and, it having appeared, that since the decrees passed in the cause in the Courts below, the husband has died, regard should be had to this circumstance in the answers to be given.

The answers returned to these questions by the law officers were as follow: 1st, by the (*Soonee*) doctrine of *Huneefa*, the extent of dower is not limited: the parties may extend it by agreement to what amount they please; 10 *dirhems* is the lowest rate. Among the *Sheeas*, the lowest or highest rate is not fixed: any thing possessing a legal value, may lawfully be given as dower; but the proper dower is 500 *dirhems*; a greater sum is not illegal, although according to some of the lawyers of that sect, it is improper. 2d, dower becomes *exigible* from the time of the contract, that is, the mutual agreement of the parties contracting the mar-

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riage; in the same manner as in sale, and other contracts, the consideration becomes due as a consequence of the contract. But as one-half of the dower may eventually be forfeited by divorce before the marriage has been consummated, it becomes certain and absolute by the act of consummation; by *Khilwuti Suheeh*, or the privacy of the parties unattended with any disability either natural or legal, from which that act is presumed; or by the death of one of the parties. The exigibility of dower does not necessarily depend on the death of one of the parties; stipulations relative to the payment of it, inserted in a deed of settlement, depend on the will of the parties, more especially on that of the wife: it is the custom, to make one half, or a third of a dower *Mooujjul*, or demandable immediately, and the remainder, *Moowujjul*, or payable at a future period; the payment of the former part should be immediate; the latter part becomes payable on divorce, or death. If the husband divorce the wife before the act of consummation, or retirement implying that act, half of the dower is demandable immediately. 4th, if the wife, being in the house of her mother, do not allow the access of her husband, the dower is not forfeited; the husband is only exempted from the charge of her maintenance. The wife, before receiving her dower, need not permit the consummation of the marriage; after receiving the dower, she should not prevent it. Before she receives the dower, she may go to the house of her mother, without the permission of her husband. 3d and 5th, Mohsin Ali, one of the witnesses deposed that a dower of 100,015, rupees was first fixed, by agreement of the parties, after the custom of the *Soonee* sect, and a deed of settlement drawn up for the amount; after which, by reason of the parties being *Shecas*, 500 rupees was the sum of dower verbally announced at the reading of the ceremony, as a matter of form. From this it would appear that the *nikah*, or marriage, a mutual contract, depending on reciprocal consent, took place before hand, and that the deed of settlement for 100,015 rupees was executed at the time; and that the sum of 500 rupees was announced as the dower at the ceremony, from respect, as before stated, to the *Shvea* tenets; so that, in such case, the contract of marriage first took place according to the *Soonee*, and afterwards, according to the *Sheea* form. Some of the other witnesses depose that the contract of marriage (*Ejabocubool*) took place at the same time the ceremony was read in the *Sheea* form, and not before. But it is satisfactorily proved, that the attestation of the witnesses to the deed of settlement, was, (as indeed the original defendant admitted) after the reading of the *Sheea* ceremony; so that, whether the contract of marriage took place, in form, once or twice, the settlement specified in the deed is good, because, if the contract was twice entered into, the first, according to both the *Soonee* and *Shera* sects, is good; for the second, among the *Shecas*, is only a matter of formal observance; and is not absolutely indispensable. If the contract were only entered into once, at the reading of the ceremony, in the *Sheea* form, in that case also the dower specified in the deed is good; because it is permitted by the doctrine of both sects, that a man may encrease the dower, without renewing the marriage, although, at the time of the marriage, it should have been settled at a specific amount. It is to be observed,

that, in the case of the heirs of the late respondent claiming his property, their claim is secondary to the appellant's claim to dower. 1809.

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gum, v.
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On comparing the law, as explained in the above answers, with the facts of the case as stated in the evidence, it appeared to the Court, that, first, a dower of 100,015 rupees was fixed by the parties, by mutual agreement, according to the *Soonee* custom, and a deed of settlement drawn up accordingly; that afterwards, the parties being *Sheeas*, the ceremony of marriage was read in the *Sheea* form, with a verbal declaration of the dower at 500 rupees, as a matter of formal observance; and that the deed of settlement was completed by the attestation of the subscribing witnesses, after the performance of the *Sheea* ceremony. The Court therefore (present B. Crisp and J. Fombelle) pronounced the deed of settlement, specifying the dower at 100,015 rupees to be good and valid, in preference to the verbal declaration of the amount at 500 rupees. The decrees of the Zillah and Provincial Courts were accordingly reversed, and a final judgment was passed for the appellant's recovering from the estate of her husband the sum of 20,000 rupees; being that part of the amount specified in the deed of settlement, for the recovery of which the present suit was instituted. The costs in each of the Courts were made payable by the parties respectively.

KALACHUND CHUKURBUTTEE, Appellant,
versus
JOOGUL CHUKURBUTTEE, and others, Respondents.

1809.

June 2nd.

IN an action brought by Kalachund Chukurbuttee, in the Zillah Court of Burdwan, against Joogul Chukurbuttee, and another, for a moiety of the *Sasun-birt*, or fee received under a *Sasun*, or patent, by the Brahmin who officiates in burning the dead, at the ghauts of Culnagunge, in the raj and zemindary of Burdwan, which moiety was estimated at 301 rupees *per annum*, a decree was passed by the Zillah Judge, awarding to the plaintiff the moiety claimed, as his right by succession to his deceased father; which person, and his elder brother before him, appeared to have held it under a grant from the rajah of Burdwan. Claim to exclusive privilege of performing within a particular limit, the Hindoo ceremony of burning the dead, and receiving the usual compensation paid for such service, allowed by the Sudder Dewanny Adawlut.

The Provincial Court of Calcutta, on appeal to them by the defendant against the Zillah decree, as it affected the particular right of the plaintiff to a share in the fee claimed by him, reversed it, on the ground, that the *Sasun-birt* in question, must have been resumed in the year 1790, at the time of the abolition of the *sayer*, or internal duties and taxes, collected by land-holders and others, and was not the right of either party.

A special appeal from the above judgment was admitted by the Sudder Dewanny Adawlut, with a view to a further examination of the point determined by the Provincial Court; and on perusal of the proceedings held upon the case, it appeared that, on the abolition of *sayer* in 1790, the revenue arising from the *birt* in

1808.

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others.

question to the zemindar, and to Government, was abolished; a proportionate deduction being at the same time made in the public assessment. But it did not appear, whether the exclusive and hereditary privilege of receiving the *Sasun-birt*, which was stated to have been enjoyed by the plaintiff and his ancestors, in compensation for the duty performed of burning the dead, had been abolished, as coming within the general rule passed on the 28th of July 1790, and re-enacted in section 4, regulation 27, 1793; or, if so, whether any indemnification had been granted to the hereditary holders of the *birt* in contest. A reference was made therefore to the Board of Revenue to ascertain these points; and the report given in answer stated, that "the records of the Board do not afford any information respecting the exclusive privilege claimed by Kalachund Chukurbuttee. It appears, however, that previously to the abolition of the *sayer*, the rajah of Burdwan levied a tax from all persons exercising any profession in his zemindary; and that *Agnee* Bramins, and *Burren* Bramins, (viz. the Hindoo priests employed to officiate in burning dead bodies) were included in the list of persons who were subject to the tax." From this report the *Sasun-birt* claimed by the appellant did not appear to have been abolished; the *sayer* abolition extending only to the tax which had formerly been levied by the rajah of Burdwan, and to the revenue derived from it by Government. And the authorized hereditary privilege, to which this perquisite was annexed, having the sanction of established custom, and of the Hindoo law, which recognizes the grant of a rajah in this and similar instances, the Court deemed it a legal private right, fit to be sustained; and determined that a claim to *Sasun-birt*, including the privilege of performing, or causing to be performed, within the limits defined by a special grant, the ceremony of burning the dead, and of receiving the usual compensation paid for such service, is maintainable, notwithstanding the abolition of the *sayer* duties. The Court therefore (present J. H. Harington and J. Stuart) reversed the decree of the Provincial Court of Calcutta in this case; and directed that Court to re-hear the appeal and pass a decision on the merits of the suit, as relative to the particular interests of the parties. (a)

(a) This decision is important in its principle, which admits the validity, under the regulations in force, of the grant of an exclusive privilege, for the performance of the rites and ceremonies of the Hindoo religion; when conformable to established usage, and sanctioned by the Hindoo law.

The judgment in this case further shews, that, in special appeals, the Court of Sudder Dewanny Adawlut do not consider themselves bound to decide more than the point on which the appeal is admitted.

The fees arising from the privilege confirmed in the present instance, however, were understood to be voluntary; and the precedent must be received with circumspection; as in the preamble to regulation 27, 1793, one of the beneficial consequences expected from depriving the land-holders of the power of imposing and collecting duties, is stated to have been "the suppression of many petty monopolies and exclusive privileges, which had been secretly continued, to the great prejudice of the lower orders of the people."

ROOPNURAYUN DEO, Appellant, ❀

1809.

versus

RAJAH QADIR ULEE, Respondent.

THIS was an action brought by Rajah Qadir Ulee, zemindar of In a suit
 Khurukpore, in the Zillah Court of Bhagulpore, on the 3d of August brought
 1805, to recover the sum of 2,443 rupees, 8 anas, 12 gundas, by respon-
 2 rowries, due for the *Fuslee* year 1212, as zemindary *russoom*, at zemindar of
 the rate of two anas per rupee, on the annual revenue arising out Khuruk-
 of the dependent estate of Chundwa Passye, held by the defen- pore, to re-
 dant. The plaintiff set forth, that plaintiff had inherited from his cover zem-
 ancestors the raj and zemindary of Khurukpore, and had been indary
 confirmed therein by the British Government. That of that *russoom*
 zemindary, Chundwa Passye and its dependencies were a consti- from a de-
 tuent portion, held by the defendant under a dependent tenure of pendent
 the nature called *ghatwalee*. That there were in the zemindary estate, to
 many other tenures of the same description, the holders of which which ap-
 regularly paid their dues. That in the accounts of Chundwa pellant
 Passye for the year 1181 *Fuslee*, the estate was charged with the settlement
 sum of 3,215 rupees, 12 anas, 2 gundas in two items; one of 2,443 direct with
 rupees, 8 anas, 12 gundas, 2 cowries, *russoom*, or perquisite of the Govern-
 zemindar, and the other of 771 rupees, 8 anas, allowance for the ment, it ap-
canoongoes. That for the latter of these, the plaintiff had pre- pearing
 viously brought a suit, and obtained a judgment; and that the settlement
 defendant had on the 9th *Zeehijree* 1188, *Fuslee*, executed an with appel-
 agreement binding himself to discharge the former. lant was
 made ex-
 clusive of
 the *rus-
soom*

The defendant in his answer, denied that his tenure was claimed by
 dependent on the zemindary of the plaintiff, and affirmed that he respondent,
 held directly of Government, by a *sunnud* under the seal and judgment
 signature of the Governor General, Mr. Hastings. He admitted given for
 the execution of the instrument adduced by the plaintiff, but respondent
 averred that it was obtained by duress. The plaintiff, he said, and appeal
 allowed that he had never received any thing under that agreement, dismissed
 and a period of more than twelve years having elapsed since its with costs.
 execution, the plaintiff's claim must be barred by the operation of
 the rule of limitations. Numerous exhibits were filed by the
 parties: of which the following, as bearing immediately upon the
 case, chiefly deserve specification.

Exhibited by the plaintiff:

A *Purwanah*, signed R. Brock, and dated 1st *Suffer* 1181,
Fuslee, or A. D. 1776; addressed to the *ryots*, *ghatwals*, and
 others of Chundwa Passye, informing them that the British
 Government had confirmed the zemindary thereof to Fuzl Ulee,
 father of the plaintiff, and directing them to be regular in the
 payment of the two ana zemindary *russoom* fixed in the time of
 the late Rajah Moozuffur Ulee.

2nd.—A *Purwanah* from Mr. Cleveland, collector of the district,
 dated 14th of September 1780, and declaring respondent to be
rajah, *chowdry*, *canoongoe*, and *malik*, of the mehals of pergunnah
 Khurukpore. (including those forming the tenure of appellant),
 and that on condition of his paying revenue, and being faithful
 to the British Government, he is entitled to the 2 ana *russoom*
 zemindary, and *nankar*, *chowdraee*, and *canoongoe*.

1809. 3rd.—Another *purwanah* from the collector of Bhagulpore, to Roopnurrayun, defendant, dated the 9th *Pooas* 1188, *Fuslee*, informing him that the settlement made with him by Government, was exclusive of the two ana zemindary *russoom*, which had been reserved to the plaintiff, and directing him to pay up the arrears, and be regular in his payments in future.

Roopnurrayun Deo, v. Rajah Qadir Ulee.

4th.—A *sunnud* conferring the zemindary of pergunnah Khurukpore (specifically including Chundwa Passye), on Rajah Qadir Ulee (plaintiff), bearing the seal of the English East India Company, and signature of the Governor General the Honorable Warren Hastings, dated the 22d *Chyite* 1187, *Fuslee*, or 1st of April 1781.

5th.—The agreement of Roopnurrayun defendant, to pay yearly to Rajah Qadir Ulee, plaintiff, a zemindary *russoom* of two anas per rupee, on the net yearly revenue of Chundwa Passye, stated therein at 7,291 rupees, in full of his rights as zemindar; bearing the seal of Roopnurrayun, and dated 9th *Zeehijree* 1188, *Fuslee*.

6th.—An account settlement of pergunnah Khurukpore, for the year 1188 *Fuslee*, wherein the lands held by the defendant are included in the plaintiff's zemindary; and the *russoom* allowed to the plaintiff, is stated at 2,953 rupees, 4 anas, 2 gundas, being 2 anas per rupee on the net revenue of the entire zemindary, including 7,291 rupees, the fixed revenue payable by the defendant.

Exhibited by the defendant:

1st.—A *sunnud* under the Company's seal and signature of the Honorable Warren Hastings, Governor General, dated the 24th of May 1776, confirming to respondent, on the death of his father Rajah Jugunath Deo, the zemindary of Chundwa Passye, and its dependencies at a yearly fixed revenue of 7,291 rupees, exclusive of *russoom* zemindary, *nankar*, &c. &c.

2nd. A *purwanah* from Mr. Chapman, Collector of Bhagulpore, to Roopnurrayun Deo, informing him that his contumacy had been forgiven by Government, and directing him to send a copy of his former rescinded *sunnud*, that a new one might be drawn out conformably thereto, dated 30th of November 1784, A. D. 7th *Kurtick* 1192, *Fuslee*.

On the 26th of June, the Zillah Judge decreed for the plaintiff on the following grounds:

1st.—The *sunnud* by which the zemindary of Chundwa Passye, and its dependencies, was conferred at a fixed yearly revenue upon the defendant appears to have been to provide for the due cultivation of the estate during the minority of the plaintiff. That *sunnud* also appears to have been revoked by the subsequent order of Council, whereby the plaintiff was reinstated in all his rights and possessions. Chundwa Passye specially inclusive.

2ndly.—In the very *sunnud* on which the defendant founds his denial of the plaintiff's right, the amount of the yearly revenue due to Government, is expressly declared exclusive of the zemindary *russoom*, and allowance for *canoongoes*, due to the plaintiff.

3rdly.—The agreement executed by the defendant to plaintiff is of itself sufficient proof of the justice of the plaintiff's claim, and the plea adduced by the defendant that it was obtained by duress is under the respective circumstances of the parties unworthy of credit.

4thly.—All the evidence goes to shew that the tenure of the defendant is strictly a dependant one; and the revenue stated by the defendant to be paid by him immediately to Government, is brought to account in the collector's books under the head of the plaintiff's zemindary. Moreover, in the account settlement for 1188 *Fuslee*, the defendant's estate is specified as part of the zemindary of plaintiff. The Zillah Judge, on the above grounds, awarded to the plaintiff the amount of the *russoom* claimed by him, with an exception to 119 rupees, 12 anas, the amount of *sayer* duties which had been abolished by Government. The plaintiff therefore to receive 2,323 rupees, 12 anas, 12 gundas, 2 cowries, only, and each party to pay proportionate costs.

1809.

Roopnura-
yun Dev, v.
Rajah
Qadir Ulee

On appeal to the Provincial Court of Moorsshedabad, that Court in its decree dated 28th of September 1807, agreed in opinion with the Zillah Judge as to the principle on which his decree was founded; but observed, that as the obligation adduced by the respondent, and admitted by the appellant, bound him to the payment of 911 rupees, 6 anas, only; being two anas per rupee on the amount of the yearly revenue therein stated rupees 7,291, the plaintiff had no claim to any further sum, and they consequently amended the Zillah decree as to the yearly amount due to the plaintiff, and the proportion of costs payable by the defendant.

The latter having preferred a further appeal to the Sudder Dewanny Adawlut, the public records connected with the documents filed by the parties were required from the Board of Revenue, and on consideration of them, the Court saw no reason to alter the decision of the Provincial Court.

The reasons which guided the decision of the Sudder Dewanny Adawlut were in substance as follows: It appeared from the evidence that previously to the grant of the *sunnud*, dated 4th of May, 1776, to appellant, Chundwa Passye and its dependencies, formed a part of pergunnah Khurukpore, the zemindary of respondent, and there was no reason to suppose that Government intended by that *sunnud* to destroy or affect the rights of the respondent, then a minor. On the contrary, in that very *sunnud*, the revenue payable to Government is expressly declared to be exclusive of the zemindary *russoom* now claimed by the respondent.

2ndly.—It is clear that in the *sunnud* dated 1st of May 1781, which the respondent obtained for the entire zemindary of Khurukpore, Chundwa Passye is included as one of the dependencies of that zemindary, and in the account settlement it is expressly declared that the respondent shall receive his *russoom* of two anas upon the yearly sum of 11,870 rupees, 7 anas, the net revenue of the whole estate including 7,291 rupees, assessed on Chundwa Passye.

3rdly.—The above construction of the grants to the parties appeared to be strongly corroborated by Mr. Cleveland's *purwanah* to the appellant, dated 9th of Poos 1188, *Fuslee*, wherein the appellant was informed that the settlement made with him was exclusive of the zemindary *russoom* of the respondent.

4thly.—The Court considered the minority of the respondent a sufficient ground for holding him exempt from the operation of the rule of limitations; the more especially as respondent consented to wave his claim to arrears of the *russoom* adjudged to

1809. him beyond the *Fuslee* year 1212, in which he instituted the present action.

Roopnara-
yun Deo, v.
Rajah
Qadir Ulee.

The Court accordingly (present J. H. Harington and J. Fombelle) confirmed the decree of the Provincial Court, and dismissed the appeal with costs; and it appearing to the advantage of both parties that their estates should be rendered entirely distinct, whilst, at the same time, the tenure of appellant, as designated in the zemindary grant conferred upon him, was undoubtedly separable from the zemindary of respondent, under section 4, regulation 8, 1793, which directs that the settlement be concluded with the actual proprietors of the soil of whatever denomination, the Court advised the appellant to apply to the Board of Revenue for the separation of Chundwa Passye with its dependencies, from the settlement of pergunnah Khurukpore, the zemindary of respondent, and suggested the adoption of this measure; deducting the yearly sums of 915 rupees, 6 anas, from the assessment of the estate of respondent; and adding it to that of the appellant. (a)

1809.

AHMUD OLLAH and FUEZA BEEBEE, Heirs of WASILA
BEEBEE, Appellants,

Aug. 7th.

versus

BEHAR ULLAH, Respondent.

In a suit by an heir of the son of A, against the widow of A, for a share of his estate, as joint heir with the widow; to which the widow pleaded that the whole estate fell to her in payment of dower, there being proof that she had received in part of her dower, the property possessed by the husband at his marriage, and afterwards remitted her claim to the resi-

THIS was an action brought by Behar Ollah, in the Zillah Court of Chittagong, on the 28th of July 1800, against Wasila Beebee (and two persons who had been servants of her late husband, Moohummud Ashik), to recover a 7 ana share of the estate of the late Abdul Mujeed. This 7 ana share was specified by the plaintiff to be as follows, viz. 147 *doons* of *malgozaree* land, assessed at 494 rupees; 10 *doons* of land exempt from assessment producing annually 165 rupees; effects valued at 186 rupees. The plaintiff claimed as cousin of the deceased, alleging, that he was heir to 7 anas, and the defendant Wasila Beebee, as mother of the deceased, heir to the remainder; and further alleging, that Wasila Beebee, in collusion with the two other defendants, kept him out of possession of the share, which he sued to recover.

The defendant Wasila Beebee set forth in her answer, that the claim was altogether unfounded; that Abdul Mujeed, late son of her husband, Moohummud Ashik, left no property; that the estate, of which the plaintiff claimed 7 anas, was the estate of her (the defendant's) husband, who made it over to her in satisfaction of the dower specified in her marriage settlement, and gave her possession; that Abdul Mujeed was manager on her part, though by her desire, he used his own signature, at the period of the decennial settlement. The other defendants made a similar statement.

It appearing to the Zillah Judge to be proved by the evidence in the case, that the estate was acquired by Moohummud Ashik, and

(a) By the judgment given in this cause, the rights of each party, under the grants made to them respectively by Government are ascertained, whilst future contention is provided against by the suggestion of rendering the tenure of appellant independent of that of respondent, in pursuance of a general rule for the permanent settlement.

was held by him as his property; that dower was settled on the defendant Wasila Beebee, at her marriage with Moohummud Ashik, to the amount of 30,000 rupees, and 500 gold mohurs; that the right of the defendant to her dower, according to an opinion taken from the law officer of the Court, was preferable to any hereditary claim of the plaintiff as an heir; and that, after satisfaction of the right of dower, there was nothing left for heirs; judgment was passed in the Zillah Court dismissing the plaintiff's claim, with costs.

1809.

After an appeal had been preferred by the plaintiff from the above decision to the Provincial Court of Dacca, Wasila Beebee died, and was succeeded in the defence of the cause by Ahmad Ollah and Fueza Beebee, stating themselves to be her heirs. It appeared to the Provincial Court, according to an opinion given by their law officer, that the execution of the deed of marriage settlement being proved, and such deed assigning, in satisfaction of the dower, the property, real and personal, of the husband; whatever property was possessed by Moohummud Ashik at the time of his marriage with Wasila Beebee, became the right of the latter, under the deed of marriage settlement, and whatever was acquired by him after his marriage, devolved to his heirs at his demise; that 2 anas of the property so acquired would go to Wasila Beebee, as the widow; and 14 to Abdul Mujeed, as the son. But as there did not appear to the Court to be proof as to what property was acquired by Moohummud Ashik before, and what after his marriage; or what heirs there were of Abdul Mujeed, besides the claimant Behar Ullah; no definitive decree was passed; but the judgment of the Zillah Court being reversed, it was ordered, that the Zillah Judge should ascertain by evidence the part of the property acquired after the marriage, and the respective heirs of Abdul Mujeed, and should cause the claimant to be put into possession of such share as should appear due to him as an heir. The costs in the Provincial Court were made payable by the parties respectively.

The heirs of Wasila Beebee appealed to the Sudder Dewanny Adawlut against the above decision, on several pleas, but chiefly on objections to the construction given to the deed of marriage settlement by the Provincial Court, in not allowing the whole amount to have been demandable. It should be observed, that this deed, bearing date the 14th of *Rujub* of the *Hijeree* year 1183, or 19th of November 1769, was in the following terms, "I Moohummud Ashik, in consideration of a dower of 30,000 rupees, and 500 gold-mohurs, one-half of which is *moonijjul*, or payable immediately, and one half *moowujjul*, or not exigible during the continuance of the marriage, have taken in marriage Wasila Banoo, daughter of Moohummud Kaeem, under the following conditions, previously agreed on: 1st, all property, of whatever sort, which I possess now, and may possess hereafter, is given in lieu of the above dower. 2nd, without the consent of my wife, whom I now marry, I will not marry another; nor will I keep any female slave as mistress. Should I do so, my wife will be at liberty to take her divorce. 3rd, I will not beat, or abuse her, against law. 4th, I will not leave her, to go away on any journey, without providing her

due; under such circumstances the property acquired by A, after marriage, declared to have been his estate heritable by his heirs; and judgment given for the claimants obtaining the share due to him as an heir of the son.

1809. with maintenance for six months, and I will not forbid her seeing her parents."

Ahmud
Ollah, and
Faeza Bee-
bee, v.
Behar Ul-
lah.

After a consideration of the evidence brought forward in the case, and of the facts, as they appeared from that evidence to the Court, the following questions were proposed to the Moohummudan law officers. 1st, if the deed of settlement be established, was the whole amount specified in it demandable? and was the part not paid by Moohummud Ashik during his life, recoverable from his estate, at his decease, twenty years after the deed was executed? or, by virtue of the first of the four conditions stated in the deed, did only the property, which he possessed at the time of his marriage, go to his wife for dower, and that which he afterwards acquired devolve to his heirs? 2nd, if the whole sum specified in the deed were demandable; and the widow, before the decease of her husband, relinquished her claim to what was then due of her dower; and, after the death of her husband, allowed his son Abdul Mujeed to take possession of his landed estate, and make the settlement for the revenue of it, as proprietor, with the collector of the district; and retain possession until his decease, one year after the death of the father; could the widow, under such circumstances, make a legal claim after the death of Abdul Mujeed, on account of dower? 3d, if Moohummud Ashik's property was divisible among his heirs; and he left a widow, Wasila Beebee; Faeza Beebee, the mother of his widow; and Abdul Mujeed, a son; what persons were his heirs, and in what proportions entitled to inherit? The answers returned to these questions by the law officers, were as follow: 1st, the assignment by Moohummud Ashik of the property he did then or might thereafter possess, being the offer of an equivalent, part of which did, and part did not, then exist, is void in law; therefore the whole amount specified as dower in the deed, would have been demandable, had not Wasila Beebee, after receiving the property in existence when the marriage took place, voluntarily relinquished, before the death of her husband, her claim to the remainder.

Under the relinquishment so made by her, all property acquired by the husband, after the marriage, devolves to the heirs. 2nd, Wasila Beebee having relinquished to her husband, the claim to the remainder of her dower; and, after his death, having permitted his son to take possession of the landed estate left by him; and to conclude a settlement for the revenue of it with Government, and the son, Abdul Mujeed, having held the same for a year, until his decease; Wasila Beebee can have no legal claim on account of dower, against such lands. 3d, Moohummud Ashik having died, leaving a widow, Wasila Beebee; a son, Abdul Mujeed; and his widow's mother, Faeza Beebee; by law, an eighth of his property falls to the widow; and the remainder to the son; the widow's mother is entitled to no part of it. Afterwards Abdul Mujeed having died, leaving his mother Wasila Beebee; and Behar Ullah, his half-cousin (son of the half-brother of his father); the mother gets a third of his property; and the half cousin the remainder. Accordingly, the estate of Moohummud Ashik being divided into 24 parts, 3 parts, or an eighth, go to the widow, Wasila Beebee; and 21 parts to the son, Abdul Mujeed. Again, on the death of

Abdul Mujeed, a third of his 24 parts, viz. 7, go to his mother Wasila Beebee; and the remaining 14 to Behar Ullah. Therefore, of the 24 parts of the estate of Moohummud Ashik, 10 parts belonged to Wasila Beebee, and 14 to Behar Ullah; and, on the death of Wasila Beebee, her 10 parts go to her heirs, one of whom is her mother, Faeza Beebee; no part goes to Behar Ullah.

1809.
Ahmud
Ollah, and
Faeza Be-
bee, v.
Behar Ul-
lah.

According to the above answers of the law officers, the Sudder Dewanny Adawlut, who were of opinion, that the facts of the widow's having relinquished, before her husband's death, her claim to what remained due of her dower, and of the son having succeeded to possession of the estate, and held it until his death as proprietor, were established in evidence, approved the decree passed by the Provincial Court, in so far as it adjudged to the heirs of Abdul Mujeed such part of the property left by Moohummud Ashik, as was acquired subsequently to his marriage. The decree passed by the Provincial Court was accordingly affirmed by the Sudder Dewanny Adawlut, who directed that the Zillah Judge of Chittagong should ascertain by evidence, and report to the Court, what property was acquired after the marriage, and what heirs, besides Behar Ullah, were left by Abdul Mujeed at his decease; so that, of the property of Moohummud Ashik and Ubdul Mujeed, so acquired after the marriage, 14 parts (of 24) together with the mesne profits from the date of the action, should be given into possession of the respondent and other heirs of Ubdul Mujeed. No personal property of Moohummud Ashik or Ubdul Mujeed appearing to the Court to be established, the claim to it was dismissed.

On the 5th of September 1810, the Court of Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle) had before them the proceedings held, by the Judge of Chittagong, in consequence of the above order, from which proceedings it appeared, that the whole of the lands possessed by Moohummud Ashik, with the exception of two mouzas (Chandgaon and Bhugully) and four *doons* of lands in another mouza, were acquired by Moohummud Ashik subsequently to his marriage. Accordingly, of the lands possessed by Moohummud Ashik, (with the exceptions above stated) it was directed, that 14 parts of 24 should be given into possession of the respondent, than whom there did not appear to be any other heirs of Ubdul Mujeed, together with mesne profits to the date on which possession should be obtained. The costs in each of the Courts were made payable by the appellant.

1809.

DEBEEPURSHAD SEIN, Appellant,

versus

May 19th.

INDURJEET SEIN, SHAMCHUND SEIN, and
SUMBHOCHUND SEIN, Respondents.

Section 28, regulation 5, 1793, construed not to require proof of corruption or partiality, of arbitrators previous to the admission of an appeal from a decision founded on their award.

THE plaintiff Debeepurshad Sein having sued in the Zillah Court, to recover from the defendants the sum of 5,253 rupees, 12 anas, 10 gundas, stated to be due as a balance of account, the case was referred for arbitration, and a decree was subsequently passed, in conformity to the award of the arbitrators, adjudging to the plaintiff only 8 rupees of the amount claimed.

On appeal by the plaintiff from the above decision to the Provincial Court of the Dacca division, on the ground of the arbitrators having been guilty of gross corruption and partiality, that Court directed the Zillah Judge to investigate the truth of the charge preferred by the plaintiff; and the evidence of the witnesses examined, not appearing to establish the alleged dishonesty of the arbitrators, the Provincial Court refused to admit the appeal.

A summary appeal from the order passed by the Provincial Court was received, under the provisions of section 8, regulation 2, 1801, by the Sudder Dewanny Adawlut; and it appeared to this Court (present J. H. Harington and J. Stuart) that by section 28, regulation 5, 1793, (which provides for the dismissal with costs of an appeal preferred against the decision of any Zillah or City Court founded on an award of arbitration, "unless it be fully proved to the satisfaction of the Court by the oaths of two credible witnesses that the arbitrators have been guilty of gross corruption or partiality in the cause in which they have made the award;") it was clearly intended that the appeal should be first admitted; and eventually dismissed with costs on failure of the appellant to establish corruption or partiality on the part of the arbitrators. The Provincial Court were therefore ordered to receive the appeal and proceed upon it according to the above construction of the rule referred to. (a)

(a) It may not be considered of material consequence whether the allegation of corruption or partiality against arbitrators be tried before, or after, the admission of an appeal from the judgment founded on their award. But it is consonant to general practice, that objections against the grounds of a judicial decision should be tried, after admitting an appeal, and it also secures the attendance of the respondent on notice to him for that purpose, previous to the investigation of such objections.

RAMMANICK MOODY, Appellant,

1809.

versus

JYNARAEN, (Father of NURSING ROY), Respondent.

Sept. 21st.

THIS was an action brought by Jynaraen, on the part of his son Nursing Roy, a minor, in the Zillah Court of Bakirgunge, on the 2d of April 1804, or 22d Chytle of the Bengal year 1210, against Rammanick Moody for the possession of a proprietary right of a share, consisting of 8 anas, 12 pies, 2 gunoas, 2 cowies, of pergunnah Chunderdeep. The annual produce of the share claimed was stated at 71,780 rupees.

It was set forth in the plaint, that, on the share in dispute being advertised for sale at auction, by the collector of the district, in 1208, in consequence of arrears of revenue due from the former proprietors, the plaintiff deputed the defendant to purchase the lands on his account, and, after taking from him a written acknowledgment of the agency, advanced him 3,000 rupees for the deposit money; that the defendant accordingly purchased the lands for the plaintiff, in his own name, on the 23rd of Assurh 1208, for the sum of 19,300, rupees, the balance of which sum was raised by the plaintiff, partly through the defendant, with whom the plaintiff afterwards settled accounts and paid the balance; that the defendant executed deeds of conveyance for the lands in favour of Nursing Roy, the plaintiff's son, bearing date the 23d of Poos 1209, notwithstanding which, on a *durkhast-i-khar'ijee*, or petition for the lands being transferred to the name of Nursing, being presented to the collector, the defendant, through his brother Radhakishen Moody, resisted the arrangement, and wrongfully kept possession of the property.

The defendant denied having purchased the lands on account of the plaintiff, or having executed any acknowledgment of agency, or deeds of conveyance, and affirmed, that he purchased the lands at the auction for himself, and that the claim preferred by the plaintiff was fraudulent.

After considering the evidence adduced on both sides, the Judge of the Zillah Court, on the testimony of witnesses for the plaintiff, who deposed to the execution of the deeds of conveyance by the defendant to the plaintiff after the receipt, by the defendant, of the sums advanced or procured by him for the plaintiff, in part of the purchase money for the lands at the collector's sale, considered the lands to be the property of the plaintiff; and gave judgment in his favour, for recovering them, with costs against the defendant.

On appeal by the defendant from the above decision to the Provincial Court of Dacca, that Court affirmed it, dismissing the appeal.

A further appeal was preferred to the Sudder Dewanny Adawlut, on the pleas, that the deeds of conveyance set up by the claimant were fabricated, and the evidence of the witnesses to their execution, false. The Sudder Dewanny Adawlut, after looking attentively into the circumstances, did not admit their authenticity, for reasons which follow: In the first place, on comparison of the name of the appellant, affixed to the deeds of con-

1809. **gulations, could not form a legal ground of action, or authorize the courts to interfere in his behalf.**

veyance set up by the respondent, with the appellant's ascertained signature on two other documents, it appeared to the Court to differ so materially in some points, as in itself to excite suspicion. Ramshunkur, a person in the employ of the respondent, (to whom it was alleged that the deeds of conveyance, with a power of attorney from the appellant, to get them registered, and the lands changed, to the respondent's name in the collector's books, had been sent by the appellant) being present in Court, stated, (with the authority of the respondent) that, within three days of the end of *Poos* 1209, the deeds were sent to him at Dacca through Nundram and Rajnaraen (people of the respondent) with the power of attorney from the appellant: that, about six days afterwards, he got the deeds registered in the presence of Nundram, Rajnaraen, Gudadhur and Guculkishore (all people of the respondent), and that he and Sheochunder (dewan of the respondent) afterwards carried the deed, so registered, to the collector's office, with a *durkhast-i-kharjee*, on the part of the appellant, to get the lands set down to the respondent's name, and was told it should be done after the usual report to the Board of Revenue. He admitted, that, from the time the power of attorney arrived, till the deeds were carried to the collector's office for getting the names changed in the registry, he never saw Rammanick Bose, the appellant's *mokhtar*, or agent, (who lived at a short distance from Dacca); that, a day or two afterwards, Rammanick came to Dacca, and, on being told of the sale, and asked for the documents relating to the auction purchase, said he had heard nothing of the sale, from Radhakishen, the appellant's brother and *mokhtar* or general agent, but that after communicating with him, Radhakishen, he would make over the papers; that immediately afterwards, Radhakishen came to Dacca, and preferred a petition to the collector, on the part of his brother, the appellant, setting forth, that the alleged sale was a fraud. Sheosing, the respondent's dewan, also present in Court, made a similar statement. The Court observed, that Rammanick Bhose and Ajodhearam, witnesses for the appellant, had stated in their depositions, that they knew nothing of the stated sale, or of the *durkhast-i-kharjee*, until the receipt of a letter from Radhakishen (brother of the appellant), stating the circumstances, on the information of Panioty, zemindar of part of pergunnah Chundeideep, and from the deposition of this person (a witness of the appellant), who, it seems, had wished to purchase the lands in question from the appellant, if he sold them, it appeared, that a writer in his service gave him information of a conveyance, and *durkhast-i-kharjee* having been brought to the collector's office by people of the respondent: that he immediately sent to Radhakishen to ask him why he had not been allowed the refusal of the purchase, who answered, that no sale had been made, and a day or two afterwards, preferred the petition to the collector, setting forth the fraud of the respondent. The Sudder Dewanny Adawlut saw every reason to believe that the appellant and his brother had actually no knowledge of the deeds of conveyance, or *durkhast-i-kharjee*, before the intelligence was conveyed to them, through Panioty, in the manner above stated. And it was improbable that the appellant, after having employed Rammanick Bose as his con-

stituted *mokhtar*, or agent for the zemindary, with the collector of Dacca, should suddenly, and without giving him the least intimation, have constituted a servant of the respondent his *mokhtar*, with directions to get the deeds of conveyance registered, and the substitution of name in the collector's registry. According to the statements made to the Court by Ramshunkur Ghose, and Sheo-shunkur Das, on the authority of the respondent, it was evident that they got the deeds of conveyance registered on the testimony of three people of the respondent, in the absence of Rammanick Bose, and without any witness on the part of the appellant, and afterwards entered the *durkhast-i kharij* in the same suspicious manner. It was remarkable too, that the collector's bill of sale, and other documents connected with the auction purchase, which, had the alleged conveyance really been executed, would, it might be presumed, have been delivered over to the respondent, had never been delivered over, but were still in possession of the appellant, and, according to the witnesses of the respondent, and the respondent's own admissions, at the time of drawing out the deeds of conveyance, there was only one person present on the part of the appellant, viz. a menial servant, whose name however does not appear in attestation of the deeds: and the respondent, who admitted that 10,000 rupees of the auction purchase money were raised on his behalf by the appellant, and who was proved, and indeed admitted by himself, to have been for some time in necessitous circumstances, gave a very improbable account of the manner in which he himself raised the remainder. On consideration, therefore, that the signature to the deeds of conveyance was in itself suspicious, coupled with the suspicious manner in which they had been drawn up and witnessed, instead of its being done in the presence of persons from both parties; together with the other circumstances above detailed, tending to confirm the belief that the deeds of conveyance were fictions, the Court disbelieved the evidence of the witnesses brought by the respondent to their execution, and would not admit them as proof of the title which the respondent sued to establish.

And putting these alleged deeds of conveyance out of the question, there was no other ground to maintain the suit. For even admitting the fact alleged by the respondent in his plaint, that the lands were bought by him *benam*, at the collector's sale in *Assarh* 1208, in the substituted name of the appellant, the Court held, that, under regulation 7, 1799, enacted previously to the purchase in question, and prohibiting purchases at the public sales in substituted names, his claim, as being the real purchaser, could not, on that ground, have been taken cognizance of; and that, even admitting him to have been the actual purchaser, defrauded of possession, no assistance could be afforded him by the civil courts. The Sudder Dewanny Adawlut, accordingly (present J. H. Harrington and J. Fombelle) pronounced, that the claim of the respondent to the lands in question, bought at public auction in the name of the appellant, was not maintainable; and reversed the decrees passed in favour of the claim, by the Zillah and Provincial Courts; with costs in each of the Courts payable by the respondent, provided assets sufficient should be found in his possession.

1809.
Rammanick Moondly, v. Jynaracen.

1809. Should the respondent actually have assisted the appellant with any part of the auction purchase money for the lands, or have raised any part of it on his account, it was intimated to him, that nothing contained in the present judgment, would hinder his having his recourse against the appellant for the amount, should it not have been repaid. (a)

Ramma-
nick Moo-
dy, v.
Jynaraen.

1809.

Nov. 27th.

CHOTEELAL, Appellant,
versus

PIRBHOONARAIN, and others, Respondents.

In a suit for possession of lands as the property of the plaintiff, to which the defendant pleaded a mortgage ("rihn") from the plaintiff's ancestor, dated 60 years before, and urged lapse of time against the claim, that plea not being of avail in cases of mortgage under regulation, 1805, the Sudder Dewanny Adawlut adjudge that the plaintiff may recover on redeeming the mortgage.

THIS was an action brought by Choteelal, in the Zillah Court of Sarun, on 21st of September 1804, or 2nd of *Assin* of the *Fuslee* year 1212, against Pirbhoonarain and others, to recover the lands of *Chuk Chok, haree* and *Chuk Mustofee*, the extent of which was stated at 337 beegahs, and the annual produce at 175 rupees.

The plaintiff claimed these lands as his hereditary property, wrongfully withheld by the defendants.

The defendants, talookdars of Leedhumpore, pleaded, that the lands in dispute had been mortgaged to their ancestor Tej Singh, by Busun Singh, ancestor of the plaintiff, in the *Fuslee* year 1153; that the defendants and their ancestor, had held them under the mortgage sixty years, and that cognizance of the present claim was barred by the rule of limitation contained in the 14th section of regulation 15, 1793.

The deed of mortgage under which the defendants stated possession to have been held, bearing date the 25th *Rubbee-no-sanee*, of the year above stated, purported to have been executed by the plaintiff's ancestor to the ancestor of the defendants, for the sum of 401 rupees, with the condition that the lands should remain with the mortgagee, and the produce be received by him, until the mortgage should be redeemed by payment of the principal sum lent, at any time the mortgagor should think proper. The Zillah Judge had doubts of this mortgage deed being genuine, by reason of its recent appearance; but at the same time, (though the plaintiff had not otherwise made out a title,) he took it to be an admission, on the part of the defendants, of the title of the plaintiff's ancestor: and, presuming, that in the period which had elapsed, the debt must have been liquidated from the produce, adjudged the recovery of the lands to the plaintiff, with costs against the defendants, in a decree bearing date the 17th of June 1805.

On appeal by the defendant from the above decision to the Provincial Court of Patna, that Court, on the ground that the defendants had been in possession prior to the date of the

(a) Since the enactment of regulation 7, 1799, the Courts can give no remedy against a fraudulent agent employed to purchase lands at a collector's sale, in his own name, in an action for possession; but may cause him to refund the amount received in an action for debt.

Yet, on proof of a conveyance subsequently executed by such agent to the real purchaser, the Court will cause performance, without enquiring too minutely into the grounds of the transaction.

Dewanny, and that the lands in dispute did not appear in Mr. Vausitart's register, as an estate separate from talook Leedhunpore, were of opinion that no legal claim could lie on the part of the plaintiff; and reversed the Zillah decree dismissing the claim, and making the costs of both Courts payable by the plaintiff.

1809.

Choteelal,
v. Pirbhoo-
narrain, and
others.

The plaintiff having petitioned for a special appeal to the Sudder Dewanny Adawlut against the above decree, the Court allowed it, on the ground of the admission of the defendants in the Zillah Court; that they held under a mortgage, to which the Provincial Court of appeal did not appear to have attended. The appeal having been accordingly heard, the appellant, on being questioned by the Court, admitted the mortgage set up by the respondents; and, by the 4th clause of section 3, regulation 2, 1805, claims in cases of mortgage not being subject to the rules of limitation, the Sudder Dewanny Adawlut were of opinion, that the appellant might redeem the mortgage; though, as there was no account brought forward of the produce of the lands, and no evidence to shew that the sum of 401 rupees had been realized from the lands; the plaintiff had not made out a title to immediate possession.

It was therefore decided by the Sudder Dewanny Adawlut (present J. H. Haington and J. Stuart), that the decree of the Provincial Court should be amended; viz. that, on the payment of the sum of 401 rupees by the appellant to the respondents, the lands should be recovered by the former; and that the respondents should render an account of the profits, in the manner stated in section 10, regulation 15, 1793, from the 28th of March 1780, the date specified in that section, on a demand being made to that effect, by the appellant, in case the profits realized should have exceeded the legal amount of interest on the sum for which the mortgage was granted.

The appellant not having established his claim to immediate possession, for which he sued, the order passed by the Provincial Court, relative to costs, was affirmed; and as the respondent had not disputed the mortgage claim of the appellant, the costs of the Sudder Dewanny Adawlut were also made payable by the appellant. (a)

(a) The fourth clause of section 3, regulation 2, 1805, on which the final decision in this case was partly founded, is in the following terms: "No length of time shall be considered to establish a prescriptive right of property, or to bar the cognizance of a suit for the recovery of property, in cases of mortgage, or deposit; wherein the occupant of the land or other property may have acquired, or held possession thereof as mortgagee or depositary, only, without any proprietary right; nor in any other case whatever, wherein the possession of the actual occupant, or of those from whom his occupancy may have been derived, shall not have been under a title *bonâ fide* believed to have conveyed a right of property to the possessor."

Section 10, regulation 15, 1793, which also regulated part of the judgment of the Sudder Dewanny Adawlut, is as follows: "In cases of mortgages of real property, executed prior to the twenty-eighth day of March, one thousand seven hundred and eighty, in which the mortgagee may have had the usufruct of the mortgaged property, whether he shall have held it in his own possession or not, the usufruct is to be allowed to the mortgagee, in lieu of interest; agreeably to the former custom of the country, (provided it shall have been so stipulated between the parties,) until the above mentioned date, subsequent to which, the same interest is to be allowed on such mortgage

1809.

Nov. 29th.

GHOLAM AHMUD KHAN, Appellant,

versus

MUNOHER DAS, Respondent.

In a suit for the amount of two bonds, with an equal sum as interest (under regulation 15, 1793, section 6, the interest due having exceeded the principal) one payment of interest is admitted, but it appears that the interest due, since that payment, exceeds the principal. The Sudder Dewanny Adawlut hold that the rule contained in the regulation quoted, relates only to interest unpaid, and in arrear, and that a sum equal to the principal is recoverable as interest, exclusive of the payment made.

THIS was an action brought by Munohar Das, in the Zillah Court of Jnanpore, on the 24th of August 1804, or 3d *Bhadon* of the *Fuslee* year 1212, against Ahmud Khan, and one Kalichurn Holdar, to recover the sum of 21,124 rupees, as debt, principal and interest, due to the plaintiff.

The plaintiff claimed under two mortgage bonds of the defendant, the first bearing date the 15th of *Poos* 1201, for rupees 8,101, and the other dated the 20th of *Bhadon* 1203, for rupees 2,461, total 10,562 rupees; each bearing interest at 12 *per cent*; and containing a mortgage, to the plaintiff, of the talook Soonwancee, &c. an *ullumgha* mehal in Benares, belonging to the defendant, to be held as security for the payment. It was stated in the plaint, that the defendant, Ahmud Khan, under cover of some contract with Kalichurn Holdar, had dispossessed the plaintiff's people of the lands: and no part of the principal having been paid, and the interest due having exceeded the principal, the plaintiff sued to recover an equal amount for interest; making (principal and interest) the sum specified.

The defendant, Ahmud Khan, stated, that he transferred his debt, (that is the debt due from himself), to Kalichurn Holdar, to whom he gave a mortgage on the lands for a further sum, including the debt, which the latter took upon himself to discharge, and affirmed, that the plaintiff agreed to it; and that the debt therefore attached only to Kalichurn. This latter defendant, in his answer, denied that the debt attached to him, stating, that he held the lands under a mortgage from Ahmud Khan, and had paid to Ahmud Khan, on receiving the mortgage, the amount due from Ahmud Khan to the plaintiff.

The Zillah Judge observed, that there was no proof that the plaintiff agreed to the transfer of the debt, from Ahmud Khan to the other defendant, Kalichurn; that the subsequent mortgage of the lands to Kalichurn, could not supersede the prior mortgage to the plaintiff, that the fact of the title deeds of the lands being with the plaintiff, was a presumption that his claim had not been satisfied, and that, with the exception of 1,633 rupees, 11 anas, which the plaintiff admitted having received as interest, there was no proof of any payment. But this sum having been received as interest, it appeared to the Zillah Judge, that, under the rule contained in the 6th section of regulation 15, 1793, viz. that "if the interest on any debt shall have accumulated so as to exceed

bonds, and also on all bonds for the mortgage of real property, which have been entered into, on or since that date, or that may be hereafter executed, as is allowed on other bonds, which have been or may be granted on, or posterior to, such date, and no more; and all such mortgages are to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum, with the simple interest due upon it, shall have been realized from the usufruct of the mortgaged property subsequent to the twenty-eighth day of March, one thousand seven hundred and eighty, or otherwise liquidated by the mortgagor."

the principal, the Civil Courts are not to decree a greater sum for interest, than the amount of such principal;" the plaintiff was only entitled to the amount which he claimed, as interest, after deducting the above sum. Judgment was accordingly passed in the Zillah Court, on the 18th of September 1806, adjudging to the plaintiff, against Ahmud Khan, the sum of 16,490 rupees, 5 anas, with costs. 1809.

Gholam
Ahmud
Khan, v.
Munohar
Das.

The Provincial Court of Benares, on appeal to them by the defendant from the above decision, affirmed it, with interest on the sum adjudged from the date of the zillah decree.

The Sudder Dewanny Adawlut, on a further appeal to them, concurred in the judgment, though with the following exception, relative to the plaintiff's claim of interest. The Court observed that the 6th section of regulation 15, 1793, directing, that if the interest of any debt shall have accumulated so as to exceed the principal, the Civil Courts are not to decree a greater sum for interest, than the amount of such principal, related only to interest unpaid and in arrear, without any relation to interest which might have been received; that, at the date of the zillah decree, the interest accruing in arrear, on the two bonds due to the respondent, having far exceeded the principal, independently of the sum paid in part of the interest, the plaintiff (respondent) was entitled, under the regulation quoted, to interest equal to the principal, independent of the sum which had been paid. The Sudder Dewanny Adawlut therefore (present J. H. Harington and J. Fombelle) affirmed the decrees of the Zillah and Provincial Courts, with further interest to the date of the final decision, and with an order that the balance of the interest originally claimed on the principal sum, should be paid to the claimant, in addition to the interest on the principal sum adjudged by the Zillah and Provincial Courts, leaving an option to the respondent, in the event of failure of payment, to cause the mortgaged property to be sold for the recovery of the amount. (a)

(a) A great deal of difference exists respecting the construction of section 6, regulation 15, 1793. Many Courts thinking with the Juanpore Court, that in no case can the amount of interest adjudged by decree of Court, exceed the amount of principal. This decision of the Sudder, independent of its authority, is undoubtedly most consonant to the literal meaning of the regulation.

1810.

Jan. 31st.

SURUBANUND PURBUT, Appellant,

versus

DEO SING PURBUT, Respondent.

In a suit for possession of the endowed lands of a *mehuntee*, the plaintiff, between whom and the defendant there had been disputes about the right of succession to the late *mehunt* determined by a *Punchayut* or assembly of *mehunts*, convened by order of the Sudder Dewanny Adawlut, to be the rightful successor; and possession adjudged to him accordingly.

THIS was an action brought by Surubanund Purbut in the Zillah Court of Sarun, on the 24th of January 1803, to recover from Deo Sing Purbut about 502 beegahs of land, held free of revenue for the service of a *muth*, or temple; the annual produce of which land was stated at 285 rupees.

It was set forth in the plaint, that the land in dispute appertained to the *mehuntee* of the late Sheo Purbut, of whom the plaintiff was the *chela*, or pupil, and appointed heir; that, after the *mehunt's* decease, disputes respecting the succession having arisen between the plaintiff and defendant, who falsely alleged himself to be the successor, the point was referred, at the period of performing the obsequies of the deceased, to a *punchayut*, or assembly of *mehunts*, by whose award it was agreed to abide, and who awarded the right to the plaintiff; that the plaintiff accordingly succeeded and held possession of the lands attached to the office of *mehunt*, but had been dispossessed by the defendant. The defendant, on the other hand, affirmed, that the late *mehunt*, in his life-time, appointed him his successor; that the *mehunt* executed to him, the defendant, a *Hibehnameh*, or deed of gift, making over to him the possessions attached to his office; that, therefore, he was the rightful successor.

According to the award of the *punchayut*, as produced by the plaintiff, bearing the signature of several *mehunts*, whose evidence moreover was taken in the case, it appeared, that the plaintiff had been placed in the *mehuntee* by the *punchayut*, at the time of celebrating the obsequies of the *mehunt*, in consequence of the assent and choice of the other *chelas* of the deceased; and it appearing, that the deed of gift set up by the defendant had not been produced to the arbitrators, the Zillah Judge presumed it to be a forgery, and rejected it, without going into evidence respecting it. The Zillah Judge, considering the plaintiff to have been duly constituted *mehunt* by the award of the *punchayut*; and the lands and other appurtenances of the *muth* being held by the person filling that office; judgment was passed in the Zillah Court for the plaintiff's recovering possession of the lands claimed by him, with costs against the defendant.

On appeal by the defendant from the above decision to the Provincial Court of Patna, that Court, on the ground of its appearing from the evidence of the *mehunts*, or *gosuens*, who signed the award in favour of the plaintiff, that they assigned to him the office of *mehunt*, in consequence of the assent and selection of the *chelas* of the late *mehunt*, without calling for the defendant's documents or evidence, and without themselves determining on the respective claims of the parties; and it appearing to the Court to be proved by the testimony of witnesses for the defendant, examined by order of the Court, that the late *mehunt* did actually select the defendant for his successor; and the Court having received a written answer, to a reference

made by them to two of the chief *mehunts* in their division, declaring the appointment of the deceased *mehunt* was valid, and that an election in opposition to his choice was not so, the Court considered the defendant the person entitled to succeed to the *mehunttee* and the rights attached to it; and accordingly gave judgment in his favour, reversing the decree of the Zillah Judge. 1810:
Surrubannund Purbut, v. Deo Sing Purbut.

On a further appeal to the Sudder Dewanny Adawlut, this Court, as the claimant had been placed in the office of *mehunt* on the presentment and the choice of the *chelas* of the deceased, without the claim of the respondent being duly investigated, deemed it proper that a new *punchayut* should be assembled, to determine, according to the custom and usage of the sect, which of the parties, or what other person, was legally entitled to succeed the late *mehunt*. A *punchayut* having been accordingly assembled, by the Zillah Judge, their award, transmitted to the Court, recited, that the members of the *punchayut*, after enquiring into the claims of the respective parties, according to a long established usage, were of opinion, that the appellant was the person entitled to succeed to the *mehunttee* in dispute, as well as to the property left by Sheo Purbut; and that the respondent had merely a right to maintenance. In conformity with this award, the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), reversed the decree of the Provincial Court, and affirmed that of the Zillah Judge, decreeing that the appellant should have possession of the lands, as *mehunt* of the establishment. The costs in each of the Courts were made payable by the respondent, who was also directed to render an account to the appellant of the receipts and disbursements of the establishment, from the beginning of the *Fuslee* year 1210, in which the suit was instituted.

RADACHURN MOHAPATUR, Appellant,

1810.

versus

GUNGANARAEN MOHAPATUR, (Heir of JUSSOODANUNDUN MOHAPATUR,) Respondent. March 5th.

THIS was an action brought by Deokinundun, father of Radha-churn, in the Zillah Court of Midnapore, on the 1st of September 1800, or 18th *Bhadon*, of the *Umlee* year 1207, to recover from Gunganaraen, a half share of the zemindary of pergunnahs Meer-godajore, &c. The annual produce of the moiety claimed was stated at 8,351 rupees. On the suit of the plaintiff for a moiety of an estate, against the son of his brother, chiefly under an alleged engagement by his brother, importing that he, the plaintiff, was entitled to a moiety

It was set forth in the plaint, that, several years since, Jussoodanundun, the elder brother of the plaintiff, was deprived of the zemindary, for misconduct, by order of Council; and the zemindary, by a regular *sunnud*, given into possession of the plaintiff; that Jussoodanundun, however, was afterwards ordered to be restored; and, on a disagreement between him and the plaintiff, who then lived together in family partnership, the plaintiff having declared his intention to sue for a half share as his right of inheritance. an *ikrarnameh*, or written engagement, was executed to the plaintiff, by Jussoodanundun, under date the 15th of *Assark* 1191, or 25th

1810.

by inheritance; the engagement rejected as a fabrication; the estate considered not devisable under the regulations; and the claim to a moiety by inheritance, even were the estate devisable, barred by lapse of time; the defendant and his father having held adverse *bona fide* possession for more than 12 years.

of June 1784, of which (as exhibited by the plaintiff) the following is a translation: "Engagement by Jussoodanundun Mohapatur, zemindar of Meergodajore, &c. Whereas, charges of harbouring robbers having been preferred against me, to the ruling power, my younger brother Deokinundun was constituted zemindar in my stead; but the zemindary was afterwards restored to me; on which occasion misunderstandings arose between me and my brother, who has declared his intention to sue for his share of the zemindary; and whereas, to prevent my said brother from prosecuting his claim, I have consented to give him the sole controul of the zemindary; I hereby agree, that my brother, Deokinundun, retaining my name current as zemindar, and living with me in partnership, shall controul and manage the zemindary, and afford me and my dependants a maintenance; should it so happen, (which God prevent,) that any quarrel or dispute should arise between us, or our children, relative to our respective shares as brothers; the hereditary zemindary, shall be divided equally, in such case, between us, or our sons." Exhibiting the above engagement, the plaintiff sued for the half share in contest; alleging, that he and Jussoodanundun, after the execution of it, lived jointly (that is, in family partnership) until the death of the latter in 1201; that after this, the plaintiff lived jointly with the defendant, his brother's son, till 1204; in which year the defendant, disregarding his father's engagement, took possession of the zemindary, as in his own right, to the total exclusion of the plaintiff.

The answer of the defendant set forth, that the engagement alleged by the plaintiff, was a fabrication; that the temporary dispossession of the defendant's father from the zemindary, was in consequence of false charges preferred against him by the plaintiff; that the plaintiff had never lived conjointly with him, or his father, or had a title to any share of the zemindary; that it was the established usage of the family for the elder son to succeed, exclusively, to the estate; that the defendant had received a separate maintenance from the zemindary, and was entitled to nothing more.

The names of several witnesses were subscribed to the written engagement, exhibited by the plaintiff; one of these, only, was called to depose to its execution. Two other persons deposed to their knowledge of it; and to the plaintiff's having lived jointly with the defendant's father, in family partnership, since the date of it. On the other hand, several witnesses for the defendant deposed to the plaintiff's execution of a *kuboolcut*, for lands held of the defendant's father, as a separate maintenance: and generally supported the answer of the defendant. The Zillah Judge believing the evidence to the *ikrarnaméh*, and considering it sufficiently established, gave judgment upon it for the plaintiff, for the moiety which he claimed, with costs against the defendant.

The Provincial Court of Calcutta, on appeal to them by the defendant from the above decision, were of opinion that the authenticity of the *ikrarnaméh* was not established; the proof to it not being satisfactory; and there appeared no probable motive for the execution of such a deed. The Provincial Court, therefore, reversed the Zillah decree passed solely on this document; leaving

an option to the plaintiff to prosecute a separate claim, on the ground of inheritance. 1810.

On appeal by the plaintiff against the above decision, to the Sudder Dewanny Adawlut, the Court, on application, obtained the Orders of Council relative to the dispossession and reinstatement of Jussoodanundun; and it was clearly ascertained that, in the *Umlee* year 1188, Jussoodanundun, then zemindar, having been charged with encouraging robbers, and the collector of the district having reported the case to the Council, he was dispossessed, and his brother constituted zemindar in his stead; but that, soon afterwards in consequence of a claim preferred by Jussoodanundun to the Judge of the district, asserting his right to the zemindary, and denying the charges imputed to him, another enquiry was instituted, by the result of which, those charges were ascertained to be unfounded, and orders were issued by Government, on the 6th of February 1786, for reinstating him; and that he accordingly obtained a *sunnud* reinstating and confirming him as sole zemindar of the pergunnah. It was not credible that Jussoodanundun, two years after this, viz. on the 5th of *Asarh* 1191, should have executed the written engagement set up by the claimant, stipulating, that his brother, merely keeping his (Jussoodanundun's) name current as zemindar; living conjointly with him, and affording a maintenance to him and his family, should have the sole controul and management of the estate. Moreover, the stipulations of this engagement were not shewn to have been carried into effect, during the life of Jussoodanundun: indeed, he appeared to have himself possessed and managed as proprietor till his decease in 1201, when he was succeeded by his son. From the contents of a *purwana* by Mr. Calvert, collector of the district, dated in 1193, there was proof that Jussoodanundun, having dispossessed the claimant of some lands connected with the zemindary, which, on investigation, were found to have been acquired by the claimant, partly by purchase and partly by gift from his mother, possession was directed to be restored to him. It was not therefore possible, that the claimant should have been then living in family partnership with his brother, or that he should have been manager of the estate; both which, however, were the engagement real, it was presumable would have been the case. On the whole, therefore, this engagement, of which the contents were in themselves improbable, and the conditions not carried into effect; and of which the circumstances induced so strong a presumption that it was fabricated, was determined not to be authentic. With respect to the hereditary claim of the appellant, independent of this engagement, (which though not formally, was in effect brought forward by grounding his claim upon an instrument recognizing his hereditary right, and upon which he insisted before the Sudder Dewanny Adawlut), the Court remarked, 1st, that the zemindary appearing to have been, by usage, not subject to division, could not, under the 5th section of regulation 11, 1793, be adjudged to be divided; 2nd, that after the lapse of eighteen years, since the date of the reinstatement of Jussoodanundun, who, until his death in 1201, held sole possession, and was then succeeded in sole possession by his son, the respondent (both of them holding under a *bond fide* title),

Radaclurn
Mohapatra,
v. Gung-
naraen Mo-
hapatur.

1810. the present claim to half the zemindary, even supposing it divisible, was not cognizable, on account of the lapse of time; either under the rule of limitation laid down in the 14th section of regulation 3, 1793; or under the subsequent rules contained in regulation 2, 1805. It was therefore decreed by the Sudder Dewanny Adawlut (present J. H. Harington and J. Stuart), that the decree of the Provincial Court, as far as related to the dismissal of the appellant's claim should be affirmed; and that part of it reversed, which left the appellant at liberty to sue on the ground of hereditary right. It was directed that the costs, in each of the Courts, should be borne by the appellant, provided assets should be found in his possession equal to the amount.

Radachurn,
Mohapatur
v. Gunga-
naraen Mo-
hapatur.

1810.

April 5th.

MEER NIZAMOODEEN, Appellant,

versus

RAMJEE MUL, Respondent.

In a suit for 10,000 rupees damages for the loss of manna appertaining to the plaintiff, which perished by the effect of damp in consequence of being forcibly detained in the warehouse of defendant. No illegal detention or want of care being proved, the suit dismissed in all the courts.

THE plaintiff, who was a travelling merchant, brought the action against the defendant, a broker at Futtyghur, to recover damages to the amount of ten thousand rupees, for the loss of a quantity of "Sheerkhesht," or manna, which he alleged to have perished by the effect of damp, in the warehouse of the latter.

The plaint set forth that the plaintiff had purchased at Kasghur, on the frontier of Tartary, six maunds and twenty-four seers (about 528lb.) of manna, the cost and charges of which amounted to 4,300 rupees, to sell again at Lucknow: that in the course of his journey he deposited the manna once at the warehouse of Jowaher Mull, broker at Juradhuree, and again at the warehouse of Gunga Bishn broker at Nujeebabad: that the above houses advanced him 550 rupees for the payment of customs and other charges, and sent forward a servant to accompany him to Futtyghur, there to receive the money. At Futtyghur, by desire of the servant so sent, he came to the house of the defendant, and lodged his property there, in the month of *Rubeoolawul* 1220, *Hijree*, or 31st of May 1800. After a short stay he wished to proceed to Lucknow, but the defendant refused to release his property, without receiving the sum above stated; and, in consequence of this detention, the manna, which had been laid in a damp place, perished. It was added, that had the defendant permitted the plaintiff to pass on to Lucknow, when he desired, he could have disposed of his manna for ten thousand rupees; and he therefore brought his action for that sum.

The defendant admitted that the quantity of manna specified had been brought, and lodged at his house; but said it was the defendant's own pleasure to bring and leave it there: that some time after his arrival, the plaintiff finding his manna would not sell at Futtyghur, went with one maund of it to try the market at Lucknow: that the defendant did not hear of him for 13 months: that he then returned empty handed, and endeavoured to sell the rest of his manna at Futtyghur; but not succeeding, had sought to indemnify himself for the failure of his speculation by bringing this suit.

The plaintiff did not deny that he remained 13 months at Lucknow, but averred that he went thither at the instigation of the defendant; who refused to let him remove the rest of his property, unless he first paid the money due from him; and said, that he had deposited the maund of manna at Lucknow with a broker, who afterwards denied the trust; and he was consequently detained, seeking justice from the Nuwab.

1810.
Meer Niza-
moodeen,
v. Ramjee-
mul.

There being no proof of any illegal detention of the plaintiff's manna, by the defendant, or of any want of due attention to the preservation of it whilst it was under the defendant's custody; the Zillah Judge, on the 28th of May 1807, dismissed the suit.

An appeal having been preferred to the Provincial Court of Bareilly, that Court, by a decree dated 8th of May 1809, concurred in opinion with the Zillah Judge, and dismissed the appeal, at the same time authorizing the respondent to apply for a public sale of the manna in his hands in payment of costs of suit, adjudged against the plaintiff, who had sued in both Courts *in forma pauperis*.

On a further appeal to the Sudder Dewanny Adawlut, this Court (present J. H. Harington and J. Stuart) affirmed the decisions of the Zillah and Provincial Courts, and finally dismissed the claim of the appellant, as not appearing to have any just foundation. (a)

LOKNAUTH CHUKURWUTEE, Appellant,

versus

KALIKUNKUR SEIN, Respondent.

1810.

May 4th.

IN a suit brought by Loknauth Chukurwutee in the Zillah Court of Bakergunge, against Kalikunkur Sein, for the sum of 1,583 rupees, 8 annas, as principal and interest of money advanced to the defendant in Bakergunge, on deeds of *Kut-kubala*, executed by the defendant to the plaintiff on lands, the property of the defendant, situated in Zillah Jelalpore; with the usual condition, that the defendant should redeem by a certain date, by payment of the money, or should give the plaintiff possession of the lands; the plaintiff set forth, that at the expiration of the time, the money was not repaid, nor possession given him of the lands (which he stated were about to be sold for arrears of revenue), wherefore he claimed the money (principal and interest); and a judgment was passed, in his favour for the amount, in the Zillah Court of Bakergunge, on the 25th of March 1803.

Plaintiff advanced money to defendant in Bakergunge, on deeds of *Kut-kubala*, on lands in another zillah, and after the term of the deeds has expired, sues for the money in the Bakergunge Court, and obtains a judgment. The Provincial Court reverse it.

On an appeal by the defendant to the Provincial Court of Dacca, that Court reversed the decree, being of opinion, that, under regulation 3, 1793, section 8, (defining the jurisdiction of the Zillah and City Courts), as the contract between the parties was relative to land situated in Jelalpore, the case was cognizable only in that Zillah, and not in Bakergunge.

(a) This case has been selected, as exhibiting an instance of traffick in manna in the Western Provinces; rather than as involving any important or general principle of decision. It may be remarked, however, that the plaintiff did not only cognate attempt to fix the defendant's responsibility upon any neglect, in taking proper care of the manna, whilst it was under his charge.

thinking the case not only cognate in the zillah

1810.

where the land is situated. The Sudder Dewanny Adawlut, rule, that the suit, being specifically for money, is clearly cognizable in Bakergunge.

The plaintiff having appealed against this order to the Sudder Dewanny Adawlut, the Court, without giving any opinion on the merits, held, with respect to the question of cognizance, that as the plaintiff's suit was, specifically for the money, as having been advanced at Bakergunge, and not for the land, the Judge of Zillah Bakergunge was clearly competent to try the merits of the cause, according to the claim preferred, under the 8th section of regulation 3, 1793, defining the jurisdiction of the Zillah and City Courts. The Sudder Dewanny Adawlut (present J. H. Harington and J. Stuart) accordingly reversed the order of the Provincial Court of Dacca, and directed that that Court should hear the appeal from the decision of the Zillah Judge, and pass judgment on the merits. (a)

1810.

July 16th.

CHINTAMUNEE MUSTOFEE, Appellant,

versus

DURUPNARAIN RAI, and others, Respondents.

Claim to right of holding lands at a fixed rent in a zemindary purchased by the defendant adjudged in favour of plaintiffs on proof of an *istimrara* tenure, and in conformity to section 49, regulation 8, 1793.

THIS was an action brought by Durupnarain, &c. in the Zillah Court of Nuddea, on the 2d of September 1803, or 18th *Bhadon* of the Bengal year 1210, against Chintamunee Mustofee, for the right of holding at a fixed *jumma* of 354 rupees, 13 anas, 1 pie, the mouza Anohea, and two other villages, situated in a talook lately purchased at auction by the defendant. The annual profit accruing from the tenure was stated to be 250 rupees.

It was set forth in the plaint, that, in the Bengal year 1082, (or A. D. 1675), Rajah Rooder Rai, zemindar of Nuddea, dispossessed Baneesur Rai, ancestor of the plaintiffs, from lands of his zemindary, giving him, in lieu, the villages in question as *hirt*, exempt from the payment of rent; under which tenure Banecsur Rai held them accordingly, till the Bengal year 1124, (A. D. 1717), when the rent free tenure was resumed; and a *jumma* of 375 rupees, 5 anas, 2 pies, was assessed, payable to the zemindar of Nuddea; that, afterwards, Baneesur having died, leaving five sons, one of them, Bulram Rai, separated his share, the proportionate rent of which was 22 rupees, 2 anas, 1½ pie; that the four others kept their lands undivided, paying the balance of rent, viz. 353 rupees, 3 anas, 1 pie; that after this, 1 rupee, 10 pies, *jumma* of some land tenanted by a person named Durganaraen Jogee, was united with that of the plaintiffs, which made it amount to 354 rupees, 13 anas, 1 pie.

The plaintiffs stated this to be the perpetual (*istimrara*) *jumma* of the lands, not liable to increase; that the defendants, from the time of their purchase in 1204, till the end of *Srawun* 1209,

(a) Section 8, regulation 3, 1793, empowers the Zillah and City Civil Courts, to take cognizance of all suits and complaints of a civil nature, against persons amenable to their jurisdiction, "provided the landed, or other real property to which the suit or complaint may relate, shall be situated, or, in all other cases, the cause of action shall have arisen, or the defendant at the time when the suit may be commenced, shall reside, as a fixed inhabitant, within the limits of the zillah or city over which their jurisdiction may extend."

received the rent of the plaintiffs regularly at that rate; since 1810. which they had molested the plaintiffs, and endeavoured to oust them; wherefore the plaintiffs sued for the right of holding the lands at the *istimrarree jumma* which they stated. Chintamunee Musto-fee, v. Durupnarain Rai, and others.

The defendant denied that the plaintiffs were entitled to hold the lands at a fixed rent; and affirmed that, since the date of his purchase of the talook, the plaintiffs had made no payment or tender of rent; also that, from the papers of the former zemindar, it would appear that the rent of the lands in question was variable.

The principal documents exhibited by the plaintiffs were, 1st, a *sunnud* under date the 15th Asar 1164, B. S. (A. D. 1737), from Kishenchund, zemindar of Nuddea, to Bando Rai and others, and their heirs; confirming the statement of the plaintiffs with respect to the lands having been once "*birt*," and afterwards resumed; as well as respecting the fixed rent stated by them. 2d, a list of resumed *birt* lands, dated in the Bengal year 1183, (A. D. 1756,) under the seal of Rajah Kishenchund, specifying those in question, and stating the fixed (*mokurrerce*) *jumma* of them to be 353 rupees, 3 anas, 1 pie. 3rd, a *purwana* by Rajah Sheochunder, dated in 1190 (1763), forbidding any increase to be exacted on the lands in question. 4th, copy of a revenue paper (*diheebundy*) dated in 1203 (1776), under the signature of the collector, stating the rent of the lands in question at the amount above specified.

The defendant, on the other hand, adduced papers to shew that the *jumma* was variable before their purchase of the zemindary right of the talook, in the time of the last proprietor; but the Zillah Judge did not consider them of any authority; and it did not appear to him that the witnesses, who were cited by the defendant, proved the variation of *jumma* which he asserted. The collector, moreover, in addition to the documents of the plaintiffs above recited, reported to the Court, that the *jumma* of the lands in question, stated in the papers of the public sale, was the amount specified by the plaintiffs. The Zillah Judge, therefore, concluded that the plaintiffs were entitled to hold the lands in question, as an hereditary tenure at a fixed rent; and accordingly gave judgment in their favour with costs against the defendant.

The Provincial Court of Calcutta, on appeal by the defendant from the above decision, concurred in it, and affirmed it; as did also the Court of Sudder Dewanny Adawlut, on a further appeal to the Court. The decree of the Sudder Dewanny Adawlut expressed the opinion of the Judge by whom the appeal was tried, that the appellant had not proved any variation of *jumma* in the time of his predecessor, the late zemindar; that, according to the documents exhibited by the respondents, the lands were proved to have been the hereditary tenure of their family, at a fixed rent; and that under the rule contained in the 49th section, regulation 8, 1793, enacted at the time of forming the permanent settlement of the land revenue; by which dependent landholders, *istimrardars*, or tenants at a fixed rent, holding their tenures from zemindars, or other superior landholders, who had already "held their land at a fixed rent for more than twelve years," were declared "not liable to be assessed with any increase either by the officers

1810. of Government, or by the zemindar, or other actual proprietor of land," the respondents were entitled to hold the land in question, as *istimrardars*, at the stated fixed rent. Final judgment was accordingly given by the Sudder Dewanny Adawlut (present J. H. Harington) affirming the decrees passed in their favour, by the Zillah and Provincial Courts, with costs against the appellant.

1810. LALA GOBIND LAL, Appellant,
versus
 July 31st. SRINARAIN RAI, and Heir of LULLUTNARAIN RAI,
 Respondents.

In a suit by independent landholder against a zemindar, for having refused him receipts on his payments of several years rent, the Zillah Court adjudged to the plaintiff damages equal to double the sum paid. This judgment reversed, on the ground that the plaintiff demanded receipts as for a fixed rent, without any title on his part to a fixed rent being proved or appearing probable.

THIS was an action brought by Lala Gobind Lal, in the Zillah Court of Purnea, on the 24th of September 1807, or 9th *Asin* of the Bengal year 1212, to obtain from Srinarain and the late Lullutnarain, receipts and an acquittance for the sum of 9,465 rupees, 9 anas, 7 pies, 2 gundas, the amount of rents paid during a certain period to the defendants, as holders of the talook Barajhenga, &c. situated in the zemindary of the defendants. It was set forth in the plaint, that the rent, payable by the plaintiff, was *istimraree*, or fixed, according to *sunnuds* and *pottas* granted to his predecessors; that, during the time of the late Ranee Indrawutee, and also for some time after her death, the plaintiff's payments of the fixed rent were regularly received; that from the beginning of the Bengal year 1211 to *Bhadoon* 1215, during which period the amount stated in the plaint had been paid to the defendants, receipts required by the plaintiff for his *istimraree* rent, had been refused him by the defendants, in opposition to section 63, regulation 8, 1793.

The defendants averred that the suit of the plaintiff was fraudulent; and affirmed that their zemindary officers had always been ready to grant receipts to the plaintiff, in the usual form, granted to other similar landholders; but that they knew nothing of any *istimraree* title of the plaintiff, who, on alleging it, had been required to produce his vouchers to prove such title, but had never done so.

From *sunnuds* purporting to be from Ranee Indrawutee, exhibited in Court by the plaintiff, the Zillah Judge concluded that the plaintiff must possess an *istimraree* title, and therefore did not consider the pleas of the defendants, with respect to not having granted receipts, to be admissible. In the 1st clause of section 63, regulation 8, 1793, cited by the plaintiff, it is declared, that every proprietor of land, on receiving rent from a dependant landholder, shall grant a receipt for each payment, and a receipt in full on the discharge of each annual obligation; and that any person to whom a receipt may have been refused, shall, on establishing such refusal, be entitled to damages equal to double the amount paid by him. Under this rule, it was decreed by the Zillah Judge, that the defendants, as having refused receipts to the plaintiff, for the amount of rents stated in the plaint, should

pay to the plaintiff the sum of 18,931 rupees, 2 añas, 15 pies, being double that amount. Should the defendants dispute the right of the plaintiff to an *istimraee* tenure, the plaintiff was left at liberty to sue for establishing it.

1810.
Lala Gobind Lal, Srinaraia Rai, and heir of Lallutaraia Rai.

The Provincial Court of Moorshedabad, on appeal to them by the defendants from the above decision, expressed their opinion, that the decree of the Zillah Judge was wrong; there not being proof of receipts having been refused to the plaintiff; that the regulation was not applicable; and that the proper mode would have been for the plaintiff to have sued to establish his alleged *istimraee* title. The decree of the Zillah Judge was reversed by the Provincial Court, leaving the parties to pay each their costs; and with permission to the plaintiff to sue for establishing an *istimraee* title.

On an appeal by the plaintiff to the Sudder Dewanny Adawlut, against the decree of the Provincial Court, the appellant was permitted to file further documents in proof of his title to an *istimraee* tenure. After inspecting them, the Court observed, that as the appellant, in his original plaint, had stated, that during 1211, and the three succeeding years, he paid rent to the respondents at the annual rate of 2,268 rupees, 2 anas, 5 pies, and required receipts for it as being an *istimraee*, or fixed rent; whereas the documents filed by the appellant stated his rent to be fixed at the sum of 1,071 rupees, 7 anas, 3½ pies, there appeared strong ground to suspect that his rent was in reality not fixed; and the Court were of opinion, that the respondents, as zemindars, were justified in refusing receipts, as for a fixed rent, demanded by the appellant, without proof of his title to hold at a fixed rent; and that, for having so done, they were not liable to the penalty specified in the 63d section of regulation 8, 1793. The Sudder Dewanny Adawlut (present J. Fombelle and J. Stuart) passed judgment accordingly, affirming the decree of the Provincial Court. The costs in this Court were made payable by the appellant.

1810. DWARKA DAS, and MOOTEECHUND, Bankers at Lucknow,
 Appellants,
 Aug. 20th. *versus*
 RAJA JHOOLAL, Respondent.

In a suit instituted in the City Court of Patna, against a resident at that place for the amount of a debt incurred in a foreign territory: the defendant pleads against the jurisdiction. But the Sudder Dewanny Adawlut overruled the defendant's plea, and determined that he was amenable, in a personal action, for debt, to the jurisdiction of the Civil Court at Patna.

On the 22nd of October 1807, the banking house of Dwarka Das and Mooteechund instituted a suit in the City Court of Patna against Rajah Jhoolal, for the sum of 152,800 rupees, stated to be due on a bond executed by the defendant, under date the 3d of *Sufur* of the *Hijera* year 1201, corresponding with the 25th of November 1786. The defendant was a person of rank, who formerly filled one of the offices of government under the Nuwab of Lucknow Asuf-ud-dowlah; and had been resident, for some years, in the city of Patna, by order of the British Government. The defendant pleaded to the jurisdiction of the City Court, on the ground that the suit arose out of a transaction which took place before he resided within the British territory. This plea having been rejected by the City Judge, the defendant preferred an interlocutory appeal to the Provincial Court of the division, which Court held, that the defendant was not amenable to the jurisdiction, for reasons in substance as follow; 1st, that at the time when the transaction took place, the parties were subjects of another state, and there did not appear any precedent of cognizance having been taken of any suit of a similar nature. 2nd, that the defendant was not resident at Patna by his own free will, but in consequence of a compulsory order, and was in all probability cut off from the means of making an adequate defence. 3d, that the lapse of time, since the cause of action was stated to have arisen, was sufficient to bar the claim under the rules of limitation laid down in the regulations. 4th, that the defendant probably took up the money, not for himself personally, but on account of the government of the Nuwab Vizier, in which case he could not be personally answerable, in conformity with the spirit of section 18, regulation 2, 1803. The Provincial Court accordingly being of opinion that the defendant was not amenable, directed that no further proceedings should be held in the case.

On an interlocutory appeal to the Sudder Dewanny Adawlut from the above order, by the house of Dwarka Das, this Court did not concur in it, but held it to be a general principle recognized by the established usage of other countries, as well as this, that a person is liable to a personal action for debt, wheresoever contracted, to the courts of the country in which he may be resident; for, otherwise, his creditors must be deprived altogether of their just recourse against him. The Court observed, that the rule in section 18, regulation 2, 1803, to which the Provincial Court adverted ("restricting the Zillah Courts from taking cognizance of civil suits originating in acts of the Vizier's government, or of his officers; or in engagements contracted by individuals with the officers of the Vizier's government in their official capacity,") was not at variance with the order passed by the City Judge; as the question whether the sum was due, or not, from the defendant personally, formed part of the merits of the case; and any plea of

the nature referred to in the above rule, if set up by the defendant, as well as any plea relative to lapse of time, or other ground of defence, was a point for the consideration of the Court, on trial of the cause. The Court further observed, that, if the transaction originated at Lucknow, the defendant would have an opportunity in his defence to bring forward any local usage applicable to similar contracts. But the Court were clearly of opinion, that the defendant was amenable to the jurisdiction of the Civil Court of Patna, and accordingly (present J. H. Harington and J. Stuart) directed that the trial of the cause should be proceeded in, providing at the same time for the trial of it by the Provincial Court, by whom, under the recent provisions of regulation 13, 1808, (the cause of action exceeding five thousand rupees,) it was properly cognizable in the first instance.

1810.
Dwarkan
Das, and
Montee-
chand, v.
Raja
Jhoola.

HURRYHUR CHOWDRY, and GHUNSHAM CHOWDRY, 1810.

Appellants,
versus

Aug. 21st.

RUNGOO BEEBEE, Respondent.

THIS was an action brought by Rungoo Beebee in the Zillah Court of Hoogly, on the 17th of November 1803, against Hurree- hur Chowdry and Ghunsham Chowdry, as heirs of Sham Chowdry, for possession of mouzas Ishurba, &c. of which the annual produce was stated at 801 rupees.

In a suit by the widow of a talookdar, for possession of the talook held by her husband, under an unexecuted decree in her favour passed by the Calcutta Dewanny Adawlat in 1785, it appeared that a prior claim

It was set forth in the plaint, that the villages in question were purchased as a talook by the plaintiff's husband, Mudaree Lal, and held by him till his death, in the Bengal year 1165, (1759, A. D.) that the plaintiff succeeded to them, and held them 11 years as proprietor, viz. till 1176, (1770, A. D.) in which year Sham Chowdry, alleging that there was no heir to the talook, obtained a *purwana* from the Nawab Mozuffir Jung, Naib Nazim of Bengal, under which he dispossessed the plaintiff; that the plaintiff sued him in the Calcutta Dewanny Adawlut, where she obtained a decree, from Mr. Petrie, then Judge of that Court, under date the 25th of August 1785; by which decree she obtained possession; but was again ousted by Sham Chowdry.

The defendants, in their answer, set forth, that, in the time of the Nuwab Mozuffir Jung, it was customary on the death of a zemindar, or talookdar, without issue, for a person to be appointed by the ruling power to succeed him; that the plaintiff's husband, having died without issue, the Naib Nazim, for the security of the public revenue, conferred the office of talookdar (*khidmuti talookdaree*) of the talook in question on their predecessor Sham Roy, and gave him a *talookdaree sunnud*; that the plaintiff had sued for possession of her husband's talook before the *Khalsa* in Calcutta, then superintended by the President in Council; by whose decision her suit was dismissed, on the 7th of September 1773; that the late Sham Chowdry and themselves had held possession since; and that the claim was not open to the cognizance of any other Court.

which she had preferred before the *Khalsa*, in 1773, was dismissed, on trial of the matter. On this, therefore, that the decision of the *Khalsa*, was a final judicial sentence,

1810.
 precluding
 the ques-
 tion from
 being again
 agitated,
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 ment of
 1785, pro-
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 illegal by
 the Sudder
 Dewanny
 Adawlut;
 and the
 claim dis-
 missed.

The Zillah Judge, without going into the merits of the case, thought himself bound to maintain the decree of Mr. Petrie, passed in 1785; which appeared to have been founded on the principle that to exclude the widow from the succession to her husband's estate was not just nor conformable to the Hindoo law. Judgment was accordingly given in the Zillah Court on the 5th of November 1805, for carrying that decree into execution.

The Provincial Court of the division of Calcutta, on appeal to them, affirmed the decree of the Zillah Judge, on the 5th of November 1807.

On a further appeal to the Sudder Dewanny Adawlut, on the part of the heirs of Sham Chowdry, this Court reversed the above decrees, for the following reasons: the Court observed, that, on the 1st of March 1770, a *sunnud* was issued in favour of Sham Chowdry, predecessor of the appellants, under the seal of the Naib Nazim, Nawab Mozuffir Jung, reciting, that Mudaree Lal (the respondent's husband) talookdar of mouzas Ishurda, &c. having died without issue, there was no talookdar; that the ryots were absconding; and there was a balance of revenue; that, therefore, the office of talookdar of the mouzas in question was conferred on Shamram Chowdry, from the beginning of the Bengal year then current, (1176,) on condition of good behaviour, punctual payment of the revenues of the talook, and giving to the widow of Mudaree Lal a *nankar*, or allowance in land, for her maintenance. The respondent, it appeared, had in the year 1773, sued Sham Chowdry before the *Khalsa*, the Court in which claims of succession to zemindaries and talookdaries were cognizable under the regulations in force at the time, alleging, that he had taken illegal possession of her deceased husband's talook; and, on the 7th of September 1773, three Members of Council, sitting as Judges in the *Khalsa*, passed a decision, dismissing the claim; and issued a *sunnud*, setting forth, that the widow of Mudaree Lal having sued for possession of the talook held by her husband, and Sham Chowdry having produced a *sunnud* from the Naib Nazim, vesting in him the office of talookdar, the right of the latter, under such *sunnud*, was maintained; at the same time directing, that two gardens, the *nankar* of the widow, should be held by her, as before, for her subsistence. On the 22d of February 1790, the Judge of Zillah Nuddea (before whom the respondent had filed a suit for possession of the talook, in conformity with the 22nd article of the judicial regulations then in force, made a reference to the Sudder Dewanny Adawlut, respecting the *sunnud* of the *Khalsa* being conclusive, or otherwise, and being informed, in answer, that the *sunnud* in question with the judgment upon which it was founded, appeared sufficient to preclude all further investigation, he dismissed the suit. In passing judgment in the present case, the Court of Sudder Dewanny Adawlut observed, that, according to the 2nd article of the regulations enacted on the 1st of August 1772, the determination on the right of succession to landed estates, having been vested solely in the President and Council, the decision of the *Khalsa*, and corresponding *sunnud* granted by the Members of Government, was a final judgment on the right to the talook in question; which consequently was not liable to sub-

sequent litigation in any other Court; that, therefore, the decree passed by Mr. Petrie, Judge of the Calcutta Dewanny Adawlut, on the 25th of August 1785, upholding the plaintiff's claim in opposition to the decision and *sunnud* of the *Khalsa*, was invalid; (which the Court presumed to have been the reason of the decree never having been enforced); and that the present decrees of the Zillah and Provincial Courts, founded upon the judgment of Mr. Petrie, were irregular. The decrees abovementioned were therefore reversed by the Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle) and the claim preferred by the respondent finally dismissed. It appeared, on inquiry from the pleaders of the parties, that the two gardens mentioned in the *sunnud* of the *Khalsa*, had been uninterruptedly in the respondent's possession. And during the investigation of this case before the Sudder Dewanny Adawlut, one of the appellants came forward and stated, that the appellants were willing to make an additional allowance to the respondent of 4 rupees *per mensem*, for life; as well as to pay the costs of suit. This was accordingly provided for in the decree. (a)

1810.

Harryhur
Chowdry,
and Ghun-
shan
Chowdry,
v. Rungoo
Beebee.

GUNGA DAS and MUNGUL DAS, *Chelas* of KISHNARAM,
deceased, Appellants,

1810.

versus

Nov. 26th.

TILUK DAS, Respondent.

THIS action was commenced by the late Kishnaram, in the Zillah Court of Tirhoot, on the 24th of August 1801, (1st *Shadoon* of the *Fuslee* year 1208.) against Tiluk Das, to recover the office of *mehunt*, of a religious establishment at mouza Ramputteer, in pergunnah Hatee, together with the lands attached to it; the value of which, reckoned at ten years produce, was laid at rupees 16,447. In a suit for a *mehunt* on the ground that the plaintiff was the successor appointed by the last incumbent, and afterwards regularly installed, the case was not made out, and claim dismissed. But the defendant, in possession of the

It was set forth in the plaint, that Dyal Das, *mehunt* of the establishment, who died in the *Fuslee* year 1191, and of whom the plaintiff was *chela*, or pupil, selected the plaintiff for his successor, shortly before his death, making him his deputy *grim moogam*, and *mokhtar*, or manager of the revenues of the establishment; and enjoined his other *chelas* to nominate him *mehunt* after his own decease; that he accordingly succeeded, though the performance of the *bundhara* or funeral obsequies, at which it is usual to nominate the successor, was, from want of funds, delayed till 1206; but that in 1201, though the regular ceremony was delayed, the neighbouring *mehunts* invested him with a turban, denoting him to be *mehunt*; that in 1203, Churun Das, *gooroo* of

(a) The Court were fully sensible of the injury sustained by the respondent, (who was undoubted heir to her husband's estate under the Hindoo law) from the arbitrary grant of the Nuh Nazim. But as this grant had been recognized and confirmed by competent authority, they were precluded from trying the merits of the claim by the express terms of section 16, regulation 3, 1793, prohibiting the Civil Courts from entertaining any cause, which from the production of a former decree on the records of the Court, shall appear to have been heard and determined by any former Judge; or any superintendent of a Court having competent jurisdiction. after the

1810. the defendant (who had set up a claim to the *mehunttee*) executed an instrument, giving up that claim; that, however, on the death of Churun Das, the defendant, his *chela*, dispossessed the plaintiff. It was added by the plaintiff that, in 1208, he celebrated the obsequies of his *gooroo* at Mirzapore, and was then regularly installed by the *mehunts*.

The defendant denied the truth of the plaintiff's statement; and set forth that Churun Das, his *gooroo*, was *chela* to Prem Das, *mehunt* of the establishment; that Churun Das, in the time of Prem Das, and afterwards in the time of Dyal Das, his successor in the *mehunttee*, was *mokhtar* of the revenues; that he (Churun Das) succeeded Dyal Das, and was regularly installed by the *mehunts* in the presence of the plaintiff; that in *Phagun* 1203, in the plaintiff's presence, Churun Das constituted the defendant his successor; and that he had succeeded accordingly; wherefore the *mehunttee* having been held by the defendant and his predecessor since the *Fuslee* year 1191. (when Dyal Das died), a period of seventeen years before the present claim was instituted, the cognizance of it was barred by the lapse of time.

The principal document adduced by the plaintiff was an *ikrar-nameh*, or engagement in writing, purporting to be by Churun Das, *gooroo* of the defendant, under date the 5th of *Kartik* 1203, reciting, that he was manager (*gomashla*) of the endowed villages in the life time of Dyal Das, his *gooroo*, that he had not wherewith to perform the *bundhura*, wherefore he had desired Kishnaram to assemble the *mehunts* for performing the *bundhura*, and had authorized him to take possession of the lands and effects; that he, Churun Das, or his *chelas*, had no claim thereto. The plaintiff also adduced a *sunaud-i mehuntee*, from Madhoo Sing, raja of Tirhoot, confirming him as *mehunt*, after the death of Churun Das. From these and other documents in the case, and from evidence of witnesses for the plaintiff, to his having been installed by some *mehunts*, in *Asarh* 1208, at a *bundhura* held at Mirzapore, the Zillah Judge, who considered the plea of lapse of time to be of no effect, as the *ikrarnameh* of Churun Das was dated within 12 years, concluded that the plaintiff was the proper successor, and that he was entitled to recover. Judgment was accordingly passed in his favour, in the Zillah Court, with costs against the defendant.

The Provincial Court of Patna, on appeal to them from the above decree, did not concur in it. The instrument purporting to have been executed by Churun Das, which the defendant denied to be genuine, did not appear to the Provincial Court to be proved: and for this, and other reasons stated in their proceedings, the Court did not consider the claim established, and reversed the Zillah decree.

The Court of Sudder Dewanny Adawlut (present J. H. Harrington) on a further appeal, confirmed this reversal, and passed the following judgment on the case: "The assertion of Kishnaram in his original plaint, that he was nominated by his *peer*, *Mehunt* Dyal Das, to be his *gaim moogam*, is not established. On the contrary, it appears that Churun Das, the eldest *chela* of Dyal Das, took possession of the *mehunttee* at mouza Ram-

puttee, and of the lands attached to it, on the death of Dyal Das, 1810. in *Poos* of the *Fuslee* year 1191; and held the same till his decease in *Phagun* 1203, above 12 years, without any claim being preferred in the Zillah Court, by Kishnaram, though present on the spot; or any assembly being convened by him, according to usage, to perform the *bundhara*, or obsequies of the deceased *mehunt*; and to examine and determine his right of succession. The *bundhara* held by certain *mehunts*, and others assembled by Kishnaram, at Mirzapore, in the month of *Asarh* 1208, 17 years after the death of Dyal Das, and above 5 years after the succession of Tiluk Das, the *chela* of Churun Das, not having been held at the *usthul*, or establishment of Ramputtee, and in the presence of Tink Das; and it not appearing, from the documents exhibited by Kishnaram, or from the evidence of his witnesses, that any investigation of the reciprocal claims of Tiluk Das and Kishnaram, to the *mehunttee*, then took place, nothing transacted at that *bundhara* can be deemed sufficient to establish the title of Kishnaram, or to render his claim cognizable, after the lapse of several years beyond the period fixed by the regulations for the judicial cognizance of claims. With respect to the *ikrarnamch*, under date the 5th *Kartik* 1203, exhibited by Kishnaram, and alleged to have been executed by Churun Das, it is not proved by the evidence of the two witnesses whose names are affixed to it; one of whom is stated to be dead, the other to have absconded; and the evidence of Dewa Das, Pholand Das, and Anundi Jha, three witnesses who deposed to the execution of this deed, in their presence, and in that of other persons, is not credible; had it been so executed, it would certainly have been attested by other persons, besides the two whose names it bears; and in particular, the attestation of Tiluk Das, the *chela* of Churun Das, who is stated to have been present, would have been required to prevent future disputes. The contents of the *ikrarnamch* are also incredible, Churun Das was not only *gonashta* of the villages attached to the establishment, in the life-time of Dyal Das, as noticed in the *ikrarnamch*, but was the elder *chela* of Dyal Das, and as such entitled to succeed him as *mehunt*, if no other person had been nominated by Dyal Das, and no other nomination is alleged in the *ikrarnamch*. The inability therein stated, to convene an assembly for the purpose of performing a *bundhara*, if true with respect to Churun Das, who had possession of the lands, must have been equally true with regard to Kishnaram, who had no lands or other funds in his possession. It is not probable, therefore, that Churun Das, after holding the *mehunttee* without molestation for nearly 12 years, and being apparently the rightful possessor of it, should have agreed to relinquish his title, and that of his *chelas*, on the ground stated in the *ikrarnamch*. Lastly, no weight whatever can be given to the letter of Rajah Madhoo Sing. confirming the claimant as *mehunt*; for similar letters appear to have been written indiscriminately in acknowledgment of the rights of Churun Das, Tiluk Das, and Kishnaram respectively. For these reasons the Court, not considering the claim of the late Kishnaram, or of his *chelas*, the appellants, to the office of *mehunt* of the establishment in question, to be established, affirm the decree passed

Gunga Das,
and Mun-
gul Das, v.
Tiluk Das.

1810. **Gunga Gao, and Mungul Das, v. Tiluk Das.** by the Provincial Court; with costs payable by the appellants, if sufficient property be found in their possession. But as it appears that at the decease of Dyal Das in 1191, and at the demise of Churun Das in 1203, no *bundhara* assembly was convened to determine and appoint the successor, which by the usage of the sect ought to have been the case, the Court direct that Tiluk Das, the present possessor, assemble a *bundhara* for that purpose; and that in the event of his not assembling it within 6 months, the Zillah Judge attach the property, and cause a *bundhara* to be assembled, and place the person then elected, in possession of the office of *mekunt*; reporting the same for the information and approval of the Court.

1810.

Nov. 17th.

Mr. JOHN BUCKLEY, Appellant,

versus

RAMSOONDER GHOSE, Respondent.

The decree of a City Court (for a balance of accounts) founded on an award of arbitration, was appealed on the allegation of corruption and partiality against the arbitrator. The Provincial Court not considering corruption proved, dismissed the appeal, under section 38, regulation 5, 1793, without adjudging interest for the time the appeal was depending.

THIS was an action brought by Mr. John Buckley in the City Court of Dacca, on the 10th of July 1794, against Ramsoonder Ghose, to recover the sum of 2,948 rupees, 9 anas, 11 pies, as a balance of account due to the plaintiff. The defendant had been employed by the plaintiff, as his *mokhtarkar*, or manager, in commercial concerns, from the month of May 1792, to April 1794; at which time the defendant was dismissed from his employment, on the ground (as stated by the plaintiff) that he had embezzled money and effects; and the sum now sued for was stated to be the amount due from the defendant at the time his employment was discontinued, consisting of 2,372 rupees, 1 ana, 10 pies, principal; and 576 rupees, 8 anas, 1 pie, interest.

The defendant, in his answer, set forth, that he was ignorant whether any sum was due from him or not, to the plaintiff, who had seized all his accounts on dismissing him from his employ: that the balance, if any, would appear, on inspecting such accounts as were genuine, or had the defendant's signature.

It having been agreed to refer the accounts to an arbitrator, it appeared from his award (not given in until the 13th of November 1802) that there were due to the plaintiff at the date of the action, 1,380 rupees, 12 anas, principal; and 320 rupees, 3 anas, interest; that the interest to the date of the award, including the above, amounted to 1,414 rupees, 13 anas. The City Judge, in conformity with the above award, gave judgment for the plaintiff, for the principal sum specified in the award, and an equal sum as interest (it not being competent to him under section 6, regulation 15, 1793, to adjudge for interest in arrear, a greater sum than the principal), together with the costs of suit.

On an appeal preferred by the defendant from the above decree to the Provincial Court of Dacca, on the plea that corruption and partiality had governed the award of the arbitrator, that Court not considering the evidence brought by the appellant to establish corruption or partiality, affirmed the zilla decree, and dismissed the appeal, with costs, on the 7th of February 1806.

The Sudder Dewanny Adawlut on an appeal to

By the 3d section of regulation 13, 1806, it is provided, that in all cases in which the Provincial Courts may affirm, in appeal, the decree of a Zillah or City Court, they are to adjudge interest at 12 *per cent*, on all sums recoverable under the decree so affirmed, from the date on which it may have been passed. On the ground that this interest had not been adjudged to the plaintiff, by the Provincial Court, in the present instance, he moved for a special appeal to the Sudder Dewanny Adawlut (the value at issue not being of an amount regularly appealable); and the Court admitted the appeal, after calling on the Provincial Court of Dacca to state their reasons for not having adjudged interest. The return made to this case recited, that in conformity with section 38, of regulation 5, 1793, which directs that "appeals preferred against the decision of a Zillah or City Court founded on an award of arbitration, are to be dismissed with costs, unless it shall be proved that the arbitrator has been guilty of corruption or partiality;" the Court, not considering either proved, had dismissed the appeal, without going into the merits; and, therefore, had not thought themselves at liberty to adjudge interest. The Court of Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), did not concur in this opinion, but held, that, under the rule contained in the 3d clause of the regulation above cited, the appellant was entitled to have interest on the amount decreed to him by the City Court, for the time the appeal was depending; and accordingly it was decreed by the Sudder Dewanny Adawlut, that interest should be recovered by the appellant on the sum awarded to him by the zillah decree, from the date on which that decree was passed, until the amount was paid to him under the decree of the Provincial Court. The costs of the Sudder Dewanny Adawlut were made payable by the respondent.

1811.
Feb. 27th. UMRUT RAM CHOWDRY, MOTEE RAM CHOWDRY,
BALKISHEN CHOWDRY and MUSSUMMAUT AMANOO
BAEE (Heirs of BHUWANNI, Das), Paupers, Appellants,

versus

KESUREE BAE, otherwise called UNCHAE BAE, and
BHUGWAN CHOWDRY (Heirs of LUCHMUN CHOWDRY),
Paupers, Respondents.

In a suit in the Zillah Court of Cuttack for possession of an estate as the plaintiff's right by inheritance from a banker, (who died 19 years before,) it appearing that the ancestor of the defendant, though not the rightful heir, had obtained a public order from the late Government, constituting him proprietor of the estate; and that possession had been held accordingly, for 14 years prior to the introduction of the British authority into the district; the claim held by the Sudder Dewanny Adawlut not to be cognizable under the 5th and 6th sections

THIS was a suit brought by the late Luchmun Chowdry, *in formâ pauperis*, in the Zillah Court of Cuttack, on the 4th of September 1806, or 29th of *Bhadon* of the *Umlee* year 1213, against the heirs of Bhuwanni Das, to recover the estate of Munjoo Chowdry, estimated (according to the plaint) in money and effects at 3,200,000 rupees.

The plaintiff claimed as adopted son of Munjoo Chowdry, setting forth in his plaint, that, on the death of Munjoo Chowdry, he was a minor, but succeeded to the property; which was taken charge of by Nugoona Bae, widow of the deceased; that Bhuwanni Das, who had been before a *gomashta* to Munjoo Chowdry, was *gomashta* on his part; and died while *gomashta*, in the beginning of 1209; that after his death, Suroopa Bae, his widow, and Umrut Ram, his adopted son, obtained wrongful possession of the property, which was now in possession of the defendants; and which the plaintiff sued to recover.

The defendants denied the right of the plaintiff; affirming, that Munjoo Chowdry never adopted the plaintiff; that Bhuwanni Das, to whom they were heirs, was his adopted son; that with the exception of certain property assigned to Nugoona Bae, in pursuance of a public order of the Raja, the defendants and their predecessor had been in possession 18 years; and that, under sections 5 and 6, of regulation 14, 1805, the claim preferred by the plaintiff was not cognizable.

The order adverted to by the defendants, and on which they chiefly relied, was denominated "*Uggyanputr*," a public document, bearing the seal of the Raja of Behar, and reciting that, after the death of Munjoo Chowdry, there had been a domestic quarrel between his widow Nugoona Bae and Bhuwanni Das, that the Raja had summoned the parties and settled the disputes; that he had constituted Bhuwanni Das proprietor of the estate; that acquittances had been executed by Nugoona Bae; and that Bhuwanni had been sent with Raja Ram, *Soobahdar* of Cuttack, to be put into possession. This was dated in the *Umlee* year 1197, and there was another document nearly of the same date, containing a release of all claims on the part of Nugoona Bae, signed also by Luchmun Chowdry, in consideration of receiving 50,000 rupees, and two houses.

The Zillah Judge passed a decree in favour of the plaintiff; reciting in substance as follows: It appears from the evidence, that the property claimed was the estate of Munjoo Chowdry; and it is proved that the plaintiff was his adopted son, and legal heir. The alleged adoption of Bhuwanni Das is not proved. It appears that he was *gomashta* only to the plaintiff. After the death of Munjoo Chowdry, the plaintiff succeeded to the estate.

Bhuwanni Das executed two *ikrarnamehs* (filed by the plaintiff, ^{1811.} purporting to be with the sanction of the Raja, and bearing his seal), acknowledging his stewardship. In the second, dated in 1206, he engaged to render an account of his stewardship at the end of three years; which brings the cause of action to the end of 1209. From vouchers produced, the estate of Munjoo Chowdry, entrusted to Bhuwanni Das, appears to have amounted to 2,651,507 rupees. From the death of Munjoo Chowdry to 1210, repeated orders, exhibited by the plaintiff, appear to have been issued by the Raja in favour of the plaintiff. The exhibit No. 42, an "*Uggyanputr*," purporting to be by the Raja, proves the title of the plaintiff to the estate. The release by Nugoona Bae is not sufficient to invalidate the plaintiff's title, because orders from the late Government granted subsequently to its date, declare the hereditary right of the plaintiff, and direct possession of the estate to be given; and must be presumed to have set it aside. A *nuzr* of six lacs of rupees, which appears to have been paid by Bhuwanni Das to the Raja, was in fact part of the estate, and appears to have been paid for the usurpation of the property. The plaintiff was clearly the adopted son and rightful heir of Munjoo Chowdry; and Bhuwanni Das, of whom the defendants are heirs, was merely the *gomashita*. It is therefore decreed, that the plaintiff recover from the defendants the sum specified above, viz. 2,651,507 rupees, with costs proportionate to the part of their claims established.

The Provincial Court of Calcutta, on appeal by the defendants, affirmed the above decision; reciting in their decree that it appeared to be right; that the title of Luchmun Chowdry as adopted son, and the stewardship of Bhuwanni Das, were proved; that the orders of the Raja of Behar, in favour of Bhuwanni Das, did not appear to have been issued on any just principle; and that the subsequent orders, issued in favour of the legal heirs, were just and proper.

On appeal by the defendants against the above decision to the Sudder Dewanny Adawlut, this Court reversed them, on the ground that the Zillah and Provincial Courts were not competent, under the regulations, to take cognizance of the question. Those Courts appear to have considered the case cognizable on the strength of certain documents filed by the plaintiff in the Zillah Court, viz. two *ikrarnamehs*, purporting to have been executed by Bhuwanni Das under the authority of the Raja, tending to prove that he was *gomashita* by appointment of the Raja till 1209; and "*Uggyanputr*," or public orders, purporting to have been issued by the Raja in favour of the legal heir subsequently to those in favour of Bhuwanni Das.

But the Court of Sudder Dewanny Adawlut were of opinion, that there was strong ground to pre-sume the fabrication of these documents; and it clearly appeared that the orders contained in them had never been carried into execution.

The following were the facts of the case as they appeared to the Court of Sudder Dewanny Adawlut: Luchmun Chowdry, an eminent merchant of Cuttack, died there in the *Umlee* year 1194, seventeen years before the introduction of the Company's authority into the Province. His widow, Nugoona Chowdurayun, made

1811. current the name of Luchmun Chowdry, a minor, the adopted son and heir of the deceased, in the commercial books and transactions of the deceased, together with the name of Luchmun Chowdry, according to custom, and held possession of the estate, in behalf of the minor; leaving the management of the commercial concerns to Bhuwanni Das, formerly *Mokhtarkar*, or principal agent of Munjoo Chowdry. Afterwards disputes arising between Nugoona Bae and Bhuwanni Das, she dismissed him from the situation of *Mokhtarkar*, appointing, in his stead, Huree Das, through whom she caused his accounts to be audited, and made a demand on him for some thousand rupees, which appeared deficient. According to the depositions of some of the witnesses of Luchmun Chowdry, she received certain golden ornaments, belonging to Bhuwanni Das and his wife, in pledge for the payment. Bhuwanni Das, through Hirbuns Rai, *Dewan* of Cuttack, then at Nagpore, made a statement of his case to the Raja of Berar (to whom Cuttack was then subject), and caused Nugoona Bae, Luchmun Chowdry, and himself, to be summoned to attend the Raja. These persons, with Raja Ram Pundit, *Soobahdar* of Cuttack, went to Nagpore accordingly in the year 1198. The Raja desired to settle the differences between Nugoona Bae and Bhuwanni Das; and to make him, jointly with her, *Mokhtar* of the commercial transactions and estate; but to this Nugoona Bae would not consent; and according to the evidence of the *Dewan* Hirbuns Rai, through whom the communications of the Raja with Nugoona Bae were carried on, made remonstrances in improper language, which incurred the Raja's displeasure. The Raja, on the ground of the disobedience of Nugoona Bae, and of her unfitness for certain offices of Government, held by the late Munjoo Chowdry, allotted to her, from the estate, the sum of 50,000 rupees, together with two houses; and in consideration of a *nuzr* of six lacs of rupees, paid by Bhuwanni Das, issued a *sunnud*, declaring him successor to the estate of Munjoo Chowdry, together with a *purwana* to the *Soobahdar* of Cuttack, to give him possession. The *Soobahdar* accordingly, assembling the principal persons of the place, gave him formal possession of the estate, with the exception of the part allotted to Nugoona Bae, and the minor son; and a further sum of 25,000 rupees, which Bhuwanni Das allowed them. From that time, till the death in 1209, of Bhuwanni Das, a period of nearly 12 years, he is proved to have been in sole possession of the estate. When he died, about two years before the establishment of the Company's authority in the province, a *sunnud* was granted by the Raja, in consideration of a *nuzr* of one lac of rupees, declaring Umrut Ram, adopted son of the deceased, his successor and proprietor of the estate; and in consideration of his minority, constituting Motee Ram, his cousin, manager on his part, issuing at the same time a *purwana* to the *Soobahdar* to give him possession, which was done accordingly. Thus the proprietary possession of Bhuwanni Das and of Umrut Ram his successor, in virtue of the public orders of the Raja of Berar, is ascertained for a period of 14 years before the Company's acquisition of Cuttack, and three years after that event, previous to the institution of the present suit. But under the 5th and 6th

Umrut Ram
Chowdry,
and others,
v. Kesuree
Bae, and
others.

sections of regulation 14, 1805, suits, in which the cause of action may have risen 12 years antecedent to the establishment of the British authority, as well as cases which within that period, may have been determined by orders of the former Government, and of which, according to the usage of that Government, cognizance could not have been taken by the persons exercising judicial authority under it, are not open to the cognizance of the British Courts. The suit in question therefore was evidently not cognizable; and the Court of Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle) decreed, that the judgment of the Zillah and Provincial Courts be reversed, and the claim dismissed with costs.

1811.

Umrut Ram Chowdry, and others, v. Kesuree Bacc, and others.

MIRZA HUSUN ALI, Appellant,

1811.

versus

MIRZA SHUREEF, and others, (Heirs of Mirza Moohummud Hosein), Respondents.

March 5th.

THIS was a suit brought by the heirs of Mirza Moohummud Hosein, in the Zillah Court of Tipperah, on the 14th of April 1803, against Mirza Husun Ali, for the sum of 14,900 rupees, as due under a decree passed against Mirza Husun Ali, by Mr. Lodge, a Member of the Dacca Provincial Council, on the 11th of April 1779. An authenticated copy of this decree, produced in Court, recited, that Mirza Moohummud Hosein had sued Mirza Husun Ali, zemindar of pergunnah Buldakhah, for sums due to him on bonds, for money lent, amounting to 10,600 rupees, and bearing interest at 12 *per cent*: that the defendant admitted the execution of the bonds, but pleaded payments, of which he would produce proof, amounting to 21,508 rupees, partly in cash, and partly by a transfer of the rents of a talook, let in farm to the plaintiff by the defendant; and that the sum demanded was decreed to the plaintiff, amounting with interest, to 14,900 rupees, subject to a provision, that the amount of any receipts the defendant might produce, should be deducted from the amount adjudged.

Claim to the amount of a decree in favour of the ancestor of the plaintiffs, passed 24 years before, disallowed on presumption arising from the lapse of time and other circumstances that it had been satisfied. No institution fee levied, and a fourth only of the regular costs made payable as in summary suits.

In opposition to the claim under this decree, the defendant in the present suit adduced receipts for the sum of 8,992 rupees, stated to have been lately discovered among some old papers, but affirmed by the plaintiffs to be fabricated. These receipts, four in number, bore date, within a few days of each other, after the institution of the original suit before the Dacca Council, and during the time it was depending. The defendant in that suit, had been called upon for evidence to his payments; but did not produce these receipts, which bore the appearance of having been recently written; and the Zillah Judge concluded them to be forgeries. He accordingly passed a decree, adjudging the plaintiffs the amount demanded; with costs against the defendant.

The Provincial Court of Dacca, on an appeal from the above decision, affirmed it, with the exception of 172 rupees; which

1811. some witnesses for the defendant, not examined in the Zillah Court, deposed to have been paid.

Mirza Hus-
sun Ali, v.
Mirza
Shureef,
and others.

A further appeal was preferred to the Sudder Dewanny Adawlut by the defendant, representing that on the first application from the plaintiffs to have the decree enforced, a reference had been made to the Sudder Dewanny Adawlut, for instructions whether, after the lapse of time, any notice could be taken of it, to which a reply was returned that an investigation might be made as to the cause of the delay in enforcing it, and whether there were any valid objections to its being enforced; that the Zillah Judge, without considering the question whether after the lapse of time, the decree ought to be enforced or not, on the ground that the defendant's vouchers were false, passed judgment for enforcing the decree, as did also the Provincial Court; that there had been no investigation respecting the farm held from the defendant by the late Moohummud Hosein, or the balances of rent due on account of it, that the decree had been satisfied by adjustment or otherwise, which was the reason of its having remained unenforced; and that at all events the limitation of 12 years must now bar its enforcement.

On consideration of these pleas, the Court of Sudder Dewanny Adawlut called upon the appellant for any papers in his possession relative to the farm of part of his zemindary by Moohummud Hosein, and for any evidence he might have to prove that balances of rent were due to him from Moohummud Hosein. Evidence on this point was taken accordingly; from which it appeared probable, that there did remain unsettled balances due to the appellant on account of the farm; but whether the balances were more, or less, than the amount of the decree against the appellant, was not ascertained; and after the time that had elapsed, it did not appear practicable to ascertain it. Considering however the recital in the decree of Mr. Lodge that the defendant had stated a set-off of 21,508 rupees, on account of cash, and balances of rent for the farm; that this decree, without investigation of the alleged set-off, adjudged to the plaintiff the sum sued for, with a provision that the defendant should be allowed a deduction of the amount of any established receipts; that Moohummud Hosein who obtained the decree, and who lived 20 years after it was passed, never applied to have it enforced; and that no sufficient reason had been assigned why application for its enforcement had not been made, there appeared to the Court to be strong ground of presumption, that Moohummud Hosein must have been indebted to the appellant for rent in a sum equal to the amount of the decree in his favour. The Court therefore (present J. H. Harrington and J. Fombelle) on these considerations, and the great lapse of time, concluded that the imperfect decree of 1779 must have been satisfied; and determined that the amount of it could not be now adjudged or recovered in execution of the original judgment. The decrees of the Zillah and Provincial Courts were reversed accordingly; with costs in each of the Courts, payable by the respondents.

The Court, at the same time, confirmed an order of the Provincial Court, which directed the institution fee, paid on the present suit

in the Zillah Court, to be returned to the respondents, and restricted the costs as in summary suits, to one fourth of the costs payable on a regular suit. (a)

RADHMOHUN RAI, RAMSIHUNKER RAI, and others,

1811.

Appellants,

versus

April 29th.

SOORUJNARAIN BANOJEAH, Respondent.

ON the 20th of June 1796, or 9th *Assarh* of the Bengal year 1203, Radhmohun Rai and others, zemindars of pergunnah Edelpore, sued Soorujnarain Banojeah, auction purchaser of pergunnah Qadirabad, in the Zillah Court of Jelalpoore, for alluvial lands called *Chur Rungabhunga*, to the extent of 55 *doons*, stating them to have been assessed at 805 rupees.

The plaintiffs claimed these lands as annexed to their zemindary by alluvion, as their right under former decrees; and as illegally taken possession of by the defendant. The defendant affirmed that the claim was groundless, for reasons detailed in his answer; and exhibited decrees passed in his own favour.

The local jurisdiction which gave cognizance of the case was transferred after the institution of the suit to Zillah Bakergunge; the Judge of which Court passed the following decree on the 7th of August 1805. "On the 28th of December 1773, Mr. Holland (one of the Provincial Council of Dacca) in pursuance of a survey made by Behader Sing (an *aumeen* who had been deputed to make a local investigation), by which it appeared that Chur Indher Manie, annexed by alluvion to tuppa Azeempore (an estate to the eastward of Edilpore), belonged to the zemindars of Auzeempore; and that Chur Runga bhunga, annexed by alluvion to pergunna Edilpore, belonged to the zemindars of Edilpore; gave judgment accordingly; and deputed the above named *aumeen* to give each party possession. On the 7th of April 1784, at the suit of the zemindars of tuppa Auzeempore, against the zemindars of Edilpore, the Judge of Bakergunge (Keating), gave a second judgment founded on the foregoing, adjudging Chur Indher Manie to the Auzeempore zemindars and reciting that Chur Runga-bhunga, was in possession of the Edilpore zemindars. The defendant brought a suit against the zemindars of Edilpore, alleging the *Chur* in possession of those persons, to have been formed from lands carried away from his zemindary, and since reannexed to it; and obtained a judgment from Mr. Armstrong, the Register of Bakergunge, as acting Judge, on the 3d of February 1786. This decree was set aside by the Provincial Court of Dacca, in confor-

(a) It was determined by the Court of Sudder Dewanny Adawlut, on the 9th of August 1797, that a petition to enforce a decree, presented after an interval of several years, does not subject the petitioner to the institution fee, as on a new suit; "the process in such case, being not to try the merits of the cause; but to determine on the enforcement of the decree after hearing the objections of the party, against whom it is desired to be enforced."

1811. mity with an opinion given by the Sudder Dewanny Adawlut, (as well as two subsequent decrees, founded on it as involving a question judicially decided) on the ground that Mr. Armstrong had no authority to act as Judge under this decree; however the defendant obtained possession of the *Chur*, which had been previously held by the plaintiffs. The defendant states the *Chur* in dispute to have accumulated by alluvion on the original site of villages of Qadinabad, his zemindary, and to have been possessed wrongfully by the plaintiffs under the name of Chur Rungabhunga; and, to prove it, appealed to certain documents, and named witnesses. These, however, as the documents do not mention the *Chur*, it is not necessary to examine. As the decree of Mr. Keating clearly establishes that the *Chur* in dispute, Chur Rungabhunga belongs to the plaintiffs, it is decreed that they recover possession; and that the costs be paid by the defendant."

Radhmohun Rai,
Ramshunker Rai,
and others,
v. Soorujnarin
Banojeah.

On appeal by the defendant to the Provincial Court of Dacca, that Court (on the 6th of December 1809), passed a decree, reciting, that the Zillah Judge had given judgment in the cause, in favour of the plaintiffs (without taking any new evidence), on the decrees passed by Messrs. Holland and Keating; that the defendant was not a party to those decrees; and that they were not immediately for the lands now in dispute. That from the new evidence, and survey of an *aumeen* taken by order of the Court, it appeared that the lands in dispute were alluvial lands, carried away from Qadirabad, the zemindary of the defendant, and reannexed by alluvion; that between the estate of the plaintiffs and that of the defendant, the river Moladee, the former boundary, was dried up, but that in the place of it there flowed a small *nullah*, or rivulet, from east to west, dividing the estates; that the zemindary of the plaintiffs was to the north of this rivulet, and the *Chur* in question to the south of it; wherefore the claim could not be admitted; and the zillah judgment was reversed, with costs.

An appeal was preferred by the plaintiffs to the Sudder Dewanny Adawlut, against the above decision, on the plea that it had been passed under a wrong conclusion as to the facts of the case, and especially as to the boundary between the estates. The Court of Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle), passed (in substance) the following judgment: "From the evidence of two of the respondent's witnesses, recorded in Mr. Armstrong's proceedings, it appears that the *Chur* in dispute from the time of its formation, till the transfer of the zemindary of Qadirabad to the respondent, was in possession of the predecessors of the appellants. Five other witnesses on the part of the respondent, servants belonging to the zemindary, have deposed to his being in possession of the *Chur*, and to its having been under water in 1180, at the time of the local investigation of the former *aumeen* Behader Sing, as well as to its being a different *Chur*, from Chur Rungabhunga; but their evidence, which is directly contrary to that of the witnesses for the appellants, does not appear entitled to credit, and the evidence of the witnesses of the appellants, respecting the possession of the *Chur* by the appellants, the circumstances of its formation, and its being the same with the *Chur* described in the survey of Behader Sing, though since considerably

enlarged, is confirmed by the evidence of the two witnesses for the respondent before alluded to; as well as by the former decrees mentioning the possession of the *Chur* by the appellants, moreover, the witnesses for the respondent state, that Moohummud Shazee, former zemindar of Qadirabad, was for three years before the respondent's purchase of the zemindary in 1187, out of possession of the *Chur*; and the respondent, after his purchase, did not prefer a claim to possession for six years, that is, till 1193; when he obtained an irregular judgment from the Zillah Register, Mr. Armstrong. But it is not probable, that had the former zemindar possessed the *Chur*, or been entitled to it, the respondent would have omitted during six years, to take measures for recovering it. That the small rivulet, alluded to by the Provincial Court should have been the boundary between the two estates, is both from the size and situation of it improbable; and does not appear from the map of the *aumeen*, to have been the limit. It appears to the Court, that the river Moladee flows between pergunna Edilpore, the estate of the appellants, and tuppa Qadirabad, the estate of the respondent; that is, that the estate of the appellants is to the North, and that of the respondent to the South; that the river has for many years by encroaching in a semicircular form, on the estate of the respondent, washed away lands from the estate of respondent, and annexed land to the estate of appellants, thereby forming the *Chur* in question; and, on the established principle that lands thus gained by the gradual retirement of a river, under the general rules of alluvion, is the lawful accession of the estate to which it is so annexed, the Court consider that the appellants are entitled to the *Chur* in question. It is accordingly decreed, that the decision of the Provincial Court be set aside; and that of the Zillah Judge affirmed; and that the appellants recover the *Chur*, with an account of the profits during the possession of the respondent from the beginning of the Bengal year 1194." 1811.

Radhamo-
hun Rai,
Ramshun-
ker Rai,
and others,
v. Sooruj-
narain
Banojeeah.

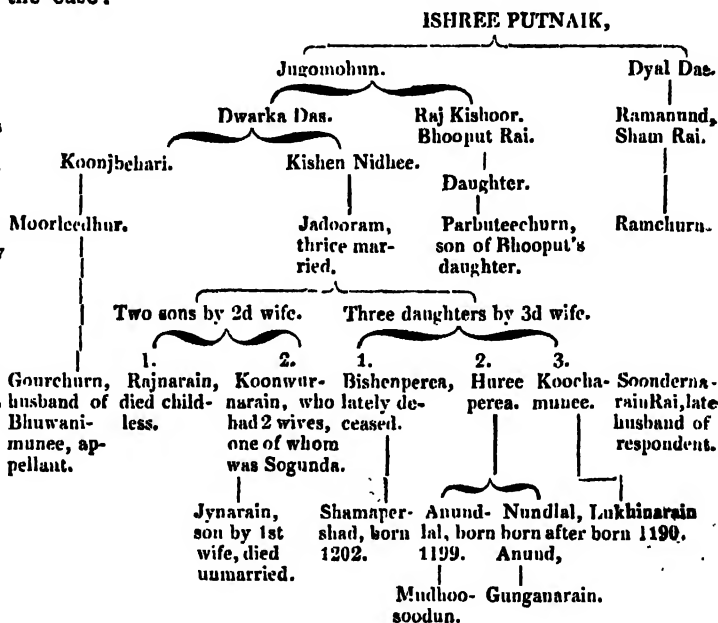
(a) The established usage on which the final decision in this case was grounded, has been stated in the case of *Rajah Grieschuud versus Muharaja Tezchuud*, May 8th, 1809; note, page 276.

1811. MUSSUMMAUT BHUWANI MUNEE (Pauper), Appellant,
versus

April 16th. MUSSUMMAUT SOLUKHNA, Widow of SOONDERNARAIN
RAI (Pauper), Respondent.

Claim to a zemindary. The respondent alleges a title through adoption by a widow under authority from her husband. The appellant claims under a written engagement alleged to have been executed by the same widow. But the adoption alleged by respondent not proved, and a Hindoo widow holding only a life interest in her husband's landed estate, could not alienate it, without the consent of the heirs at law. This not having been given, and the appellant who was plaintiff in the case not being the heir at law, her claim dismissed. Right of succession to the es-

THIS was a suit brought by Bhuwani Munee, in the Zillah Court of Midnapore, on the 22d of December 1804, or 19th *Mugh* of the *Wulhitee* year 1212, against the late Soondernarain Rai, for the zemindary right of the pergunnas Durodumna, &c. 12 in number; of which the annual produce was estimated at 115,825 rupees. The subjoined genealogical sketch will tend to elucidate the case:



The plaintiff claimed the zemindary, setting forth in her plaint, that, from Ishree Putnaik, it had devolved regularly to his descendants, till it fell to Jynarain Rai, son to the cousin of her husband; that after his demise, the plaintiff, and Sogunda his step-mother (2d widow of Koonwarnarain his father,) were the heirs; that they disagreed, and it was at length settled that the zemindary should be held in the name of Sogunda, she executing to the plaintiff the following written engagement: "I, Ranee Sogunda, zemindar of Durodumna, &c. write and engage to Bhuwani Munee thus: my husband, Koonwurnarain, and your husband, Gourtee-churn, were kinsmen, descended from the same ancestor. I will give you for your life what is requisite for your private expences and religious charges. Should you die before me; I will perform your obsequies, and other pious offices, and if I die in your life time, you will perform the same for me; and will become pro-

prietor of all my estate. Besides you, there is no sharer with me in the estate; without your consent, I will not alien any part of it. Should any one sue for a part of it as heir, the claim of such person will be invalid." This engagement was stated to have been executed by Sogunda, on the 22d of *Poos*, 1193, and in virtue of it, the plaintiff claimed the zemindary, alleging, that the defendant, Soondernarain Rai, after Sogunda's demise, had been wrongfully placed in possession. 1811.
tate deter-
mined in
another
cause.
See next
Report

The defendant contradicted the plaintiff's statement as to the regular devolution of the zemindary, affirmed, that the engagement brought forward by the plaintiff was a forgery: and that he, the defendant, was entitled to the zemindary, as having been adopted by Sogunda, under authority to that effect from her husband. A deed termed *Niyumputra*, purporting to be by Sogunda, and relating to the adoption, was also brought forward by the defendant.

On the 26th of May 1806, the Zillah Judge passed a decision against the plaintiff, reciting in his decree, that it appeared the zemindary, after the removal of Parbutteechurn Rai, was conferred by the ruling power (Aliverdi Khan) on Jadooram Rai, wherefore it was not necessary to enquire whether the parties had any title as descendants from any person of the family antecedent to Jadooram: that moreover both parties appeared to claim by a right derived immediately from Sogunda; the plaintiff under a written engagement, not considered authentic; and the defendant under an adoption, not considered to be proved. On the presumption which appeared against the parties, and their principal witnesses, the whole were at the same time committed by the Zillah Judge for trial before the Court of Circuit; the former for forging documents, the latter for swearing to their authenticity.

Yet the cause was brought in appeal before the Provincial Court of Moorshedabad, who, on the 6th of September 1809, affirmed the decree of the Zillah Court, having previously decided in another appealed cause that the right to the zemindary was vested in neither of the present parties; but in the grandsons of Jadooram.

A further appeal was brought to the Sudder Dewanny Adawlut by the claimant. Soondernarain died soon after the appeal commenced, and was succeeded by his widow. After perusing the proceedings held in the cause, the Sudder Dewanny Adawlut observing that the claimant rested chiefly on the written engagement said to have been executed to her by Sogunda in *Poos* 1193; and having doubts whether, supposing it to be authentic, it could be of any legal avail against the right of the heirs at law, a question was proposed to the Pundits: Whether, if Sogunda really executed the deed in 1193, without the assent of the heirs of Jadooram Rai, then living, it was competent to give the claimant a title of succession to the hereditary estate possessed by Sogunda, to the prejudice of the heirs of Jadooram Rai. A second question was at the same time proposed, whether, after the demise of Jynarain in the Bengal year 1193, the claimant had any hereditary right of succession to the zemindary; and whether, now, after the demise of Sogunda, supposing the engagement, and the alleged adoption of the late respondent, not established, the appellant had any right, by inheritance, to the zemindary.

1811.

MUSSUM-
maut Bhu-
wani Mu-
nee, v.
Mossum-
maut Solu-
khna.

The Pundits answered as follows; "Supposing Sogunda to have executed the engagement of 1193, without the assent of the heirs by descent from Jadooram, then living, it will not avail against the right of these heirs to the zemindary, which descended from Jadooram to Koonwurnarain; nor will it establish any title in the appellant. After the demise of Jynarain, the appellant had not, according to the stated pedigree, any right to the zemindary by inheritance. And now, after the death of Sogunda (supposing the engagement not genuine, and the alleged adoption by Sogunda under authority from her husband, not established), no right of succession to the zemindary vests in the appellant."

It appearing from the above exposition of the Hindoo law, that even allowing the engagement on which the appellant rested her claim to be authentic, it could not legally avail in favour of the appellant, and that, independently of this deed (which was not produced during the life of Sogunda, and appeared on strong grounds of presumption to have been fabricated), the appellant neither after the demise of Jynarain in 1193, nor subsequently at the death of Rancee Sogunda, had any right of inheritance to the estate in dispute; the Court of Sudder Dewanny Adawlut (present J. H. Harington) affirmed the decrees passed against the appellant, and dismissed her appeal with eventual costs, if she should be found to possess assets for the payment of them.

1811.

MUSSUMMAUT SOLUKHNA, Widow of SOONDERNARAIN

Rai. Appellant,

May 27th.

versus

RAMDOLAL PANDE, Guardian and Manager of SHAMAPERSHAD PANDE, a Minor; LUKHENARAIN, and HUREE-PEREA MUNEE. Mother of ANUNDAL, and NUNDAL, Minors, Respondents.

A zemindary held by a person who had two wives, (on his death fell to his only son by his first wife;) on whose demise unmarried, it went to the latter's step-mother, viz. the second wife of his father; after demise of

THIS suit was brought by Govindram, father of the minor Shamapershad, in the Zillah Court of Midnapore, on the 15th of February 1805, or 6th *Phagun* of the *Wulaitee* year 1211, against Sundernarain, and others, for the zemindary right of the *peguunas* Durodumna, &c. 12 in number, being the estate already mentioned in the report of the preceding cause. The plaintiff sued in behalf of the minor, his son; whose mother Bishenperera, was the daughter of Raja Jadooram; (a) and the suit was instituted, on the ground that the zemindary claimed was the right of the minor, grandson of Jadooram, by the Hindoo law of succession.

The defendant Soondernarain pleaded, that, after the demise of Jynarain Rai, son of Koornarain Rai, and grandson of Jadooram Rai, the zemindary having fallen to Rancee Sogunda, the 2nd wife of Koornarain, she under authority delegated from her husband, adopted him, Soondernarain, in the *Wulaitee* year 1196, (A. D.) executing at the same time, to his father, an instrument termed *Niyumputra*; after which she continued in possession of the ze-

(a) *Vide genealogical sketch in the preceding case.*

mindary till 1210, when shortly before her death, she made it over 1811.
to the defendant.

The *Niyumputra* alluded to, purporting to have been executed by Sogunda, on the occasion of her adopting Soondernarain, recited, that with the permission of her husband, she had adopted the defendant as a son, and performed the requisite ceremonies; that during her life he should be maintained and educated; and at her death should succeed to her zemindary, and other property. This bore date the 19th *Magh* 1196, *Wulaitee*, corresponding with 29th of January 1789.

The Zillah Judge, on the 28th of May 1806, passed a decree, reciting, that in the preceding cause, the allegation of the defendant, as to his adoption, had been adjudged false, and the *Niyumputra* a fabrication; that in the present case, Lukhenarain and others, four sons of Bishenperea, Hureperea, and Koochamunee, daughters of Jadooram, appeared to be heirs of the zemindary; and to ascertain it, a question was put to the Pundit; who replied, that these would take four anas each. It was adjudged accordingly, that the plaintiff Shamapershad, being one of the four grandsons of Jadooram, should obtain four anas, or a quarter share; and the others their respective shares, on application for them to Shamapershad, who should, in the mean time be put in possession on their behalf.

On appeal by Soondernarain from this judgment to the Provincial Court of Moorshedabad, that Court (on the 13th of April 1808) affirmed it, reciting in their decree, with reasons in detail, that there was no sufficient proof of authority to Sogunda from her husband to make an adoption; that the stated adoption of the appellant appeared to them unfounded, and the *Niyumputra* to have been fabricated.

After the institution of a further appeal to the Sudder Dewanny Adawlut, Soondernarain died, and was succeeded by his widow, as appellant. Hureeperea Munee, second daughter of Jadooram, on the part of her minor sons Anundlal and Nundlal; and Lukhenarain, son of Shookamunee, third daughter of Jadooram, were also joined with Shamapershad, son of the eldest daughter of Jadooram, as respondents in the cause. After consideration of the proceedings held, and of objections urged against the decrees of the Zillah and Provincial Courts, the Sudder Dewanny Adawlut directed (present J. H. Harington), that the *Niyumputra* set up by the appellant, and the genealogical table of the family, should be given to their Pundits, for an exposition of the Hindoo law, on the points which appeared material in the case, as contained in the following questions:

1st, If a widow, with authority from her husband, adopts a son, is it usual or not for her to execute a document of the nature of the *Niyumputra* exhibited by Soondernarain? and if such document be executed by the widow, does it or not, preclude the right of the adopted son to succeed to the husband's zemindary during the life of the widow? 2nd, If a widow adopts a son with the sanction of her husband, does the widow, or the son, thenceforward, perform the obsequies, and other religious ceremonies, in the name of the husband and his ancestors? 3d, If a zemindar die leaving a son,

which second wife, a distant relation of the family alleges he was adopted by her unauthorized authority from her husband, and sets up a title to the estate on that ground. But the fact of due authority for his adoption having been delegated by the husband, not being established, judgment is given for the collateral heirs of the last male proprietor, who died unmarried, viz. for six daughters, sons of his grandfather, in equal shares; with reservation of the right of any other daughter's sons, who may be born after the decree. Opinion given by the *pundits*, that authority to a wife to adopt, in the event of disagreement between her and a son

1811.

of the husband then living, would not avail; though authority to adopt in the event of that son's death, would be valid. A *Niyumputra*, or declaratory deed executed by a widow, reciting, that she had adopted a son under authority from her husband, and declaring that the estate was to remain with her during her life, and to go to the son adopted at her demise, held to be of no avail in law; for immediately on the adoption of a son by a widow under authority from her husband, the estate to which she has succeeded in default of male issue, becomes the property of the son adopted.

whose mother is dead, and a second wife, is it customary and legal, or not, to authorize the 2nd wife to adopt a son, on account of probable disagreement between her and the son of the first wife, or on any other account, except in the event of the death of the son by the 1st wife. 4th, If Soondernarain was not adopted by Sogunda under authority from her husband; or if his adoption be not proved, or though established, be not of avail in law, who were the legal heirs at the demise of Ranee Sogunda to the zemindaree in dispute, possessed formerly by Raja Jadooram; then by his son Koonwurnarain; then by Jynarain, son of Koonwurnarain; and after Jynarain's death, by Sogunda, his step-mother, there existing, at Sogunda's demise, Bishenperea, and Hurreperea, daughters of Raja Jadooram, Shamapershad, Anundlal and Lukhinarain, sons of the said daughters of Jadooram; and there now existing also Moodoo Soodun, and Gunganarain, two other sons of the daughter of Jadooram, who have been born since the demise of Sogunda.

The answers returned to these questions by the Pundits were as follow; 1st, When a woman, after the death of her husband, adopts a son under authority received from him for that purpose, it is not lawful or customary to execute an instrument of the purport of the *Niyumputra*; and though such an instrument be executed, the adopted son, during the life of the woman adopting him, becomes proprietor of the estate left by the husband and his deceased son. The widow is not entitled to possess the estate by virtue of such a document. 2nd, When a woman under authority from her deceased husband adopts a son, thenceforward the ceremonies mentioned must be performed by the adopted son in whom the right vests; not by the widow." 3rd, If a zemindar have two wives, and, by the first, who is deceased, a son eleven years of age, and no son by the second; in such case it is not lawful for the zemindar, when ill, a few days before his death, on the representation of his second wife, that there would not be cordiality between her and the son of the first wife, to give authority to his second wife to adopt a son, in case of disagreement with the said son. But provisional authority to adopt in the event of the death of such son, would be lawful. And if a zemindar, having a son of his body, with the consent of such son, or from a wish to have more sons (for the performance of religious acts) give authority to his wife to adopt a son, such authority, according to the *shaster*, and usage of the country, is lawful. 4th, If Ranee Sogunda adopted Soondernarain without authority from her husband; or his adoption be not valid in law; the zemindaree in dispute, formerly held by Raja Jadooram, and his son Koonwurnarain; and by the son of the latter, Jynarain; and after Jynarain's death, by Sogunda his step-mother, the second wife of Koonwurnarain, legally devolves after the death of Sogunda to Shamapershad, Anundlal, Nundlal, and Lukhinarain, sons of the daughters of Jadooram, who were then alive; and to Gunganarain and Muddoosoodun, two other sons of the daughters of Jadooram, who are since born, the whole six heirs being now alive, in equal proportions.

The Pundits were further questioned by the Court, whether supposing one or more sons, to be hereafter born to Hurreperea, the surviving daughter of Jadooram, they would be added to

any share of the inheritance? and it was declared in answer, that they would be entitled to share with the other daughters sons of Jadooram, who are now living. 1811.

The principal authorities cited by the Pundits in their *vyavastha*, were the following texts: Mussum-
mant So-
lakhna, v.
Ramdolal
Pande, and
others.

In support of answer 1st.

Menu.—"The true legitimate issue, the son of a wife, a son given, and one made by adoption, a son of concealed origin, and one rejected, [by his parents] are the six heirs and kinsmen."

Devala.—"All these adopted sons are pronounced heirs of a man who has no son by himself begotten."

In support of answer 2nd.

Marichi.—"A son shall perform the funeral obsequies and other rites of his deceased father."

Sancha and Vrihaspati.—"A son should present the funeral cake and offer libations of water to his deceased father; if there be no son, let the widow [of the deceased owner], and in her default, his uterine brothers, perform his obsequies."

In support of answer 3rd.

Vrihaspati.—"A son should be anxiously adopted by one destitute of male issue, for the sake of the funeral cake, libations of water, solemn rites, and for the celebrity of his name."

Atri.—"A subsidiary son should even be adopted by one who has no male issue for the sake, &c. *ut supra*."

Juggunnath's Digest.—"Sridhara Swami in his gloss on the following verse of the *Bhagavata* ["To Reechi, O king! with the consent of Setarupá, he gave Acúti, imposing on her the duty of an appointed daughter, although she had brothers living,"] quotes a text of law on the benefit arising from a multitude of sons to explain the motive for desiring many children, when a subsidiary son is adopted even though a principal one be living "many sons are to be desired, that some one of them may travel to Gaya." The adoption of a son given, although a son of the body be living, being thus valid, he shall have a third part as his share."

Dattaca Mimansa.—"Since Viswamitra during the life-time of his legitimate son adopted Devurátá, whose filiation he rendered complete by obtaining the consent of that son, it must be allowed that a man having already a son living, is nevertheless competent to adopt another."

In support of answer 4.

Jimuta Vahana.—"The right of succession [to the estate of a deceased Hindoo] of the offspring of the grandfather and of the great-grandfather, including the daughter's son, must be understood with reference to the order of proximity observed in offering the funeral cake. For a daughter's son, like a son's son, is without distinction, the means of the preservation [of a deceased owner] in the next world."

Juggunnath's Digest.—"In the *Daya Bhaga*, the following text and gloss occur. In default of a son, a grandson [a great-grandson, a widow, and a daughter] the daughter's son shall obtain the inheritance."

For a daughter's son, equally with a son's son, preserves the deceased owner in the next world; there is consequently not any

1811. distinction between them. And a father's daughter's son also is the means of the preservation of the deceased owner, (equally with his own daughter's son) since he (the father's daughter's son) presents an oblation (namely, to his maternal grandfather,) in which the deceased owner participates.

Mussum-
maut So-
lukhna, v.
Ramdolal
Pande, and
others.

Jimuta Vahana.—The succession of the grandfather's and great-grandfather's lineal descendants, including the daughter's son, must be understood in a similar manner, according to the proximity of the funeral offering; since the reason stated in the text, for even the son of a daughter delivers him in the next world, like the son of a son, is equally applicable: and his [*i. e.* the deceased owner's] father's or grandfather's daughter's son, like his own daughter's son, transports his manes over the abyss, by offering oblations of which he may partake.

Juggunnath's Digest.—In the *Dāya Bhāga* it is thus written, "If one die leaving neither son nor grandson, the daughter's sons shall inherit the estate; for by consent of all, the son's son and the daughter's son are alike in respect of the celebration of obsequies, since the reason, &c. *ut supra*."

After considering the answers given by the Pundits, the Court (present J. H. Harington) observed, that the decision, as far as related to the appellant, depended on proof of the fact whether Ranees Sogunda actually adopted Soondernarain or not, with sufficient authority delegated from Koonwurnarain, her husband. The only proof to the fact of authority for adoption having been given to Sogunda, by her husband, was the evidence of Ochubanund Naik, Gungadhur Misr and Sudanund Chukrwutee, three witnesses examined on a summary inquiry relative to the succession in the absence of the respondents, and consequently not cross-examined by their *vakeels*: and the evidence of Perbhooram Chukrwutee (*purohit* of Sogunda) and Cheitun Churn Das (an old family servant from the time of Jadooram), two witnesses examined in the cause of Bhuwani Munee, *versus* Soondernarain; the depositions of which five witnesses were allowed with the consent of the pleaders of respondents, to form the evidence of the appellant to the fact in question. But considering that the last testimony of these witnesses was given after a period of 20 years, relative to a conversation said to have taken place between Raja Koonwurnarain and Ranees Sogunda, (who, from her rank, could not be exposed to public view) in the presence of nine men, as mentioned in the deposition of Perbhooram; and weighing the improbability of Koonwurnarain's authorising the adoption of a son on the ground alleged, when Jynarain, a son of his body, and 10 or 11 years of age, was living; or supposing him to have intended to grant such authority, the probability that he would have called together his kinsmen, and given a formal authority in writing to prevent future doubt and contention instead of an unpremeditated verbal permission on the Ranees expressing a doubt of cordiality between Jynarain, then a boy of 10 or 11 years of age, and herself, without any other conversation, as deposed to by the above witnesses, their evidence was not deemed by the Court at all satisfactory; or sufficient to establish a legal authority of adoption, to the exclusion of the heirs at law

next in succession; nor, even admitting the truth of the testimony given by these witnesses, would the conditional permission stated by them to have been given by Koonwurnarain for the adoption of a son by Sogunda, in the event of disagreement between her and his son Jynarain, have been a sufficient authority for the adoption of Soondernarain, three years after Jynarain's death, when no such disagreement could subsist. Whether a Hindoo having a son of his body, can, in any case, authorize the adoption of a son during the life of such son of his body, appeared to the Court an important question of law, not fully investigated, or settled; but which, without proof of authority for the adoption having been delegated to Sogunda, it was not necessary to determine in the present instance. It was further observed, against the credit of the witnesses to the delegation of authority from Koonwurnarain to Sogunda, for the adoption of Soondernarain, that they deposed also to the execution of the *Niyumputra*, exhibited by Soondernarain, and purporting to have been dated the 19th of *Magh* 1196, or 20th of January 1789; though from this document not having been produced, or mentioned, by Soondernarain, to the Collector of the district, when he attended the Collector, after the demise of Sogunda, to obtain possession of the zemindary; and from his having then stated (in answer to a requisition from the Collector for a deed of adoption, or any other written instrument he might possess, in proof of his title), that there was a *Hibehnameh*, or deed of gift, which the Ranee had executed in his favour in her last moments, without making any mention of the *Niyumputra*, as well as from striking contradictions in the evidence, relative to the Ranee's sealing and signing the *Niyumputra*; and from the fact that the names of the five attesting witnesses were, contrary to established custom, notwithstanding they could all write, admitted not to have been written by them, but written by another person at their direction (though they were unable to say who that person was); the Court saw strong ground for presuming that the *Niyumputra* was, as affirmed by the respondents, a recent fabrication: and this conclusion was strengthened by the circumstance, declared in the *vyuvustha* of the Pundits, of its being unusual to execute such a document in cases of real adoption; inasmuch as it would be of no effect to bar the immediate succession of the adopted son. From an official letter written by the Salt Agent at Hidgelee, under date the 26th of December 1789, mentioning that Sogunda had nominated a *paluk beta*, or adopted son, and that great discontent had been expressed in consequence by the heirs next in succession, there was indeed reason to conclude, that Sogunda, prior to that date, either adopted, or expressed an intention to adopt Soondernarain. Still this afforded no proof of any sanction for her so doing; but rather the fact of the heirs manifesting discontent, was in favour of the conclusion, that the act was unauthorized. And it might be presumed, that if Soondernarain had been legally adopted as a son to Koonwurnarain, he would have exercised the rights and performed any of duties of an adopted son, especially in presenting funeral oblation, and doing other religious service, as the part of the forance of which the adoption of sons is.

1811.

Mussum-
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1811.

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Ramdohal
Pande, and
others.

was established by the evidence of the appellant's witnesses, that Sogunda exercised the full rights of zemindar during her life; and that Soondernarain, though he attained the age of maturity, prescribed by the Hindoo law, more than three years before her demise, did not during her life offer the *pind*, or perform any of the religious services which were incumbent on him, if really and legally the adopted son of Koonwurnarain. On the whole, therefore, the evidence to the delegation of the authority for the adoption, which was in itself manifestly suspicious, and which was given by the same persons who, in the judgment of the Court, gave false testimony to the execution of the *Niyumputra*, was not considered competent to establish the fact, of authority having been delegated to Sogunda by her husband for the adoption of Soondernarain, and, consequently, no title of succession to the disputed estate was deemed to have vested in him.

The decrees of the Zillah and Provincial Courts as far as they rejected the alleged adoption, and title of Soondernarain, were affirmed. But as there appeared to be now six daughters sons of Jadooram, viz. Rampershad, Anundlal, Nundlal, Lukhenarain, Mudhoosoodun, and Gunganarain; (the two last born to his daughter Hureeperea since Sogunda's death), and, according to the exposition of the Hindoo law, delivered by the Pundits, these six were entitled to share the zemindary equally with reservation of the eventual birth of other sons to Hureeperea, who would be entitled to share with the other daughters sons; the zemindary was adjudged, with this reservation, to the six daughters sons of Jadooram above specified; as being the heirs at law to Jynarain, who held the estate before Sogunda; with an account of mesne profits. (a)

(a) An appeal to the King in Council, by the widow of Soondernarain, was preferred in this case; but it has been since withdrawn by her; on an adjustment with respondents (Shamapershad excepted) respecting the mesne profits of the estate, during the possession of her husband.

COLLECTOR OF TIPPERAH, and AMEEROODEEN,

1811.

Appellants,

versus

June 5th.

KISHORERAM DOSS, Respondent.

THIS was an action brought by the respondent in the Zillah Court of Tipperah, on the 10th of September 1804, to set aside the sale of a 2 ana, 7 gunda, share of the pergunnah of Mychal, the estate of the respondent; which the Collector had, under the orders of the Board of Revenue, disposed of to the appellant, Ameerodeen, by public auction, in liquidation of arrears of revenue. The yearly produce of the lands was specified at sicca rupees 2,275.

It was stated in the plaint, that Gourree Sunkur Rai, the zemindar of a 2 ana share of the pergunnah Mychal, had, previously to the permanent settlement of the land revenue, unjustly taken possession of a 2 ana, 7 gunda, share of the same pergunnah, the zemindaree of the plaintiff; that Gourree Sunkur Rai, being in possession at the time the above settlement was concluded, an engagement for sicca rupees 2,087, 12 anas, the *sudder jumma* of the two shares, forming together a 4 ana, 7 gunda division of the above pergunnah, was taken from him, in the Bengal year and the 1199; that on the 15th *Mugh*. 1201, (26th of January 1795), the plaintiff obtained a decree in the Zillah Court of Tipperah against the said Gourree Sunkur Rai; adjudging to him the hereditary zemindaree of 2 anas, 7 gundas of pergunnah Mychal. and ordering that he should be put in possession thereof: that the Collector of Tipperah gave possession accordingly on the 2d *Asir* 1202, on 14th of June 1795; and took an engagement from the plaintiff for sicca rupees 1,120, 9 anas (being the proportion for 2 anas, 7 gundas, of rupees 2,087, 12 anas); the sum at which a settlement for the whole 4 ana, 7 gunda, portion had been made with Gourree Sunkur Rai: that the plaintiff had, from that time till 1208, paid the public revenue due on the 2 ana, 7 gunda share, holding the same as an entire estate, consisting of distinct *mehals*: that in the course of this period, portions of the 2 ana estate of Gourree Sunkur had been sold, at different times, in liquidation of arrears of revenue incurred by him; and lastly, that three of the persons who had purchased these portions having fallen in arrears for the Bengal years 1206 and 1207; the Collector, under the orders of the Board of Revenue, dated 22d of December 1801 (*Poon* 1208), had sold the 2 ana, 7 gunda share of the plaintiff, along with the lands of the defendants, in liquidation of these arrears; which sale, the plaintiff brought the present action to annul.

It was urged in answer by the defendant, Ameeroodeen, that as the 2 ana, 7 gunda, share of the plaintiff, had never been separated, in the manner prescribed by the regulations, from the other portions of the 4 ana, 7 gunda estate, for which a settlement had been concluded with Gourree Sunkur Rai; the estate still continued answerable for whatever balances of assessment arose on any of the shares.

It appearing from the documents exhibited on the part of the

1811. plaintiff, consisting of the public accounts, and sundry advertisements for the sale of lands. that the revenue due on his share had, as above stated, been paid separately on a distinct engagement; that the other shares of the 4 ana, 7 gunda estate had been sold separately for arrears incurred by the proprietors, and that the 2 ana, 7 gunda portion of the plaintiff had likewise been advertised for sale separately, on account of arrears due by the plaintiff, but discharged previous to the time fixed for the sale, the Zillah Judge was of opinion, that the share of the plaintiff formed a distinct estate; and was not liable to be sold in liquidation of arrears accruing on the other shares. He therefore passed a decree in favour of the plaintiff, setting aside the sale of the 2 ana, 7 gunda share, and adjudged costs of suit payable by the defendant.

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ram Doss.

On appeal by Ameerroodeen to the Dacca Provincial Court, that Court concurred in the opinion of the Zillah Judge; and affirmed the zillah decree, with costs of suit payable by the appellant.

On a petition for a further special appeal from the above decrees, at the instance of the Board of Revenue, on the ground that the Board having given no authority for the execution of the separate engagement which had been entered into with the respondent, his share must be held answerable, in common with the other shares of the 4 ana, 7 gunda estate, for the revenue of Government, the Court of Sudder Dewanny Adawlut, under section 10, regulation 2, 1805, admitted the appeal; and the purchaser of the land, Ameerroodeen, was made a joint appellant with the Collector.

The Court having required the production of such documents, connected with the subject of this suit, as might be found in the records of the Board of Revenue; two *jumma wasil bukee* accounts of pergunnah Mychal, and sundry papers relative to the public sales which had taken place, were procured.

Though, from the above documents, and the other exhibits in the case, it appeared that the Collector had taken the separate engagement from the respondent without informing the Board of Revenue, and without making a division of the lands, and allotment of the *jumma*, in conformity with the provisions of regulation 25, 1793, as required by the second clause of section 4, of that regulation, yet it also appeared, that the Collector, in the *jumma wasil bukee* account of 1202 (the first that was made out after the respondent, under the judgment in his favour, obtained possession of his estate), had entered the respondent's 2 ana, 7 gunda share, as a distinct estate, and had referred to the decree of Court, under which he had separated it from the estate of Gourree Sunkur; that from the period at which the above engagement was taken from the respondent, viz. *Asar* 1202, B. S., till the year 1208, when the public sale, on which the present action is founded, was ordered by the Board of Revenue, the 2 ana, 7 gunda share of pergunnah Mychal was stated in the public accounts (*towjee* and *jumma wasil bukee*) as the separate estate of Kishoreram Doss, bearing the assessment above specified; and that in the years 1800 and 1801, when the sale of this share was proposed by the Collector, to make good a balance of revenue due for the Bengal years 1206 and 1207, the proposed sale was, in both instances, authorized by the Board of Revenue, as of an entire estate, subject to the stated assessment

of sicca rupees 1,120; and as far as appeared from the Collector's statement (detailing the villages comprised in the 2 ana, 7 gunda portion proposed to be sold), consisting of seventeen villages, or portions of villages, in the separate possession of Kishoreram Doss.

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It further appeared, that in consequence of arrears of revenue becoming due from Gouree Sunkur Rai, the original possessor of the 4 ana, 7 gunda portion of pergunnah Mychal, who engaged, as above stated, for the public revenue of that division in the Bengal year 1199, several successive public sales took place, of different portions of the 2 ana portion of the pergunna; that these (with some exceptions) after being for several years stated in the public accounts as distinct *mehals*, and the revenue of them being separately received from the proprietors, were considered liable to be re-united as a joint estate, on the ground that no regular division of the lands, or allotment of the revenue had taken place; and that accordingly, the 4 ana, 7 gunda, division of pergunna Mychal, (with the exceptions above referred to,) comprising the 2 ana, 7 gunda zemindaree of Kishoreram, was publicly sold, by order of the Board of Revenue, on the 10th of January 1802, at a consolidated *jumma* of 1,664 rupees, 9 anas, 12 gundas; to make good a balance of 380 rupees, 14 anas, 17 gundas, due from Bindrabun, Moommud Shaker, and Kalee Sunkurpal, holders by purchase of separate portions of the 2 ana estate of Gouree Sunkur, and was purchased by the appellant, Ameeroodeen.

Under the above circumstances, and in consideration of the length of time during which the share of the respondent had been held by him, and entered in the public accounts, as well as repeatedly acknowledged by the Board of Revenue, as a separate estate, the 2d and 3d Judges of the Court of Sudder Dewanny Adawlut (J. H. Harrington and J. Fombelle) were of opinion, that if the respondent were, as he alleged, in possession of distinct villages or portions of villages, the separation of his estate from the other portions of the pergunnah, must be considered as complete; and that the Board of Revenue was not authorized, by the regulations, to re-unite the 2 ana, 7 gunda share of pergunna Mychal, the zemindaree of Kishoreram Doss, to the other portions of the pergunnah, and hold the zemindaree of the respondent answerable for arrears of revenue due from the proprietors of the other portions. That, at all events, the respondent could not, under the circumstances of the case, be justly held answerable for the arrears of revenue, on account of which the sale in question had taken place, those arrears having accrued previous to the re-annexation of the estates, and without the appointment of a common manager, as required for joint estates by sections 23, 24, and 25, regulation 8, 1793, till those sections were rescinded by section 2, regulation 17, 1805, whilst the respondent was, at the same time, paying the revenue under a separate engagement with the collector, with the knowledge and virtual sanction of the Board of Revenue, according to which he had been acknowledged, and paid his assessment for several years, as the proprietor of a separate estate.

A decree was accordingly passed, in conformity with the opinion

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lands had been partly bought, appeared to have been obtained almost solely on his credit.

The plaintiff, on the other hand, had been chiefly engaged in the management of the joint lands, and in other employments, procured through his brother's means, or subordinate to him.

All the witnesses agreed in deposing that they considered the defendant as the real purchaser of the lands, some of them estimating the fortune of the plaintiff to that of the defendant as 1 to 7.

The Zillah Judge, on consideration of the circumstances of the case, and the opinion of his law officers, "that by the Hindoo law, two brothers, contributing equally and out of their earnings to the acquisition of any joint property, ought to share equally; but that if one contributed more than the other, he was entitled to a proportionably larger share," passed a decree, adjudging to the plaintiff a 7 ana share, viz. 7-16ths of the lands in dispute.

On appeal by the defendant, Radhanath Chukurwutty, to the Moorsheadabad Provincial Court, that Court, after taking the opinion of their Hindoo law officers, which coincided nearly with the *vyuvustha* delivered by the pundit of the Zillah Court, being of opinion, that the share of the disputed lands adjudged to the plaintiff by the Zillah Court, was considerably greater than he appeared to be entitled to from the amount of his contribution to the purchase money, passed a decree, amending the decree of the Zillah Judge; and adjudging to Koshul Chukurwutty, the respondent, a 2 ana share, or 1-8th only of the joint estate.

On a further appeal to the Sudder Dewanny Adawlut by Koshul Chukurwutty, the pundits of the Court delivered a *vyuvustha*, reciting, that, "of lands purchased by two brothers, living together in common, without any paternal fortune, from their joint earnings, (*sadharunoparjun*) each was entitled to share in proportion to what he had contributed, without regard to seniority; and that where the proportionate contribution of each was not determined, there was no rule in the Hindoo law by which the respective shares, to which each was entitled, could be settled."

On enquiry by the Court, the pundits further stated, that if it should appear that the disputed lands were acquired partly by the capital of the respondent, and partly by the labour of the appellant, in that case each would be entitled to a half share; or that if they were acquired with the joint labour and capital of the respondent, and of the labour only of the appellant, in this case, the respondent was entitled to 2-3ds, and the appellant to 1-3d of the land.

Under the above opinions of the law officers, and on equitable consideration of all the circumstances of the case, especially the presumption arising from the evidence, that the respondent had contributed chiefly the money by which the lands were purchased, but that the appellant gave his time and labour to the improvement of them, for the joint benefit of his brother and himself, the Court (present J. H. Harington and J. Fombelle) passed a final decree, amending the decrees of the Zillah and Provincial Courts, and adjudging to the appellant a third portion of the lands, with a proportionate share of the mesne profits from the date of his being ousted to the period of the execution of the decree.

The costs of suit in the three Courts were made payable by each party respectively. (a)

GOOROOPERSHAD BOSE, and other Heirs of GORAL BOSE,

Appellants,

versus

BISNOOCHURN HEYRA, Respondent.

July 31st

THIS was an action brought on the 13th of June 1804, in the Zillah Court of Beerbhoom, by Bisnoochurn Heyra, to recover possession of certain *aurungs*, or iron manufactories, situate in the district of Beerbhoom, within the limits of pergunnah Mullarpore, the defendant's landed estate, and for the proprietary dues levied on the iron there manufactured.

It was stated in the plaint, that the revenue derived from the iron mines of the late Beerbhoom zemindary, having always been kept distinct from the rent of the land in which they lay, the whole of the former was collected separately by the zemindar, at certain *aurungs* or places of manufacture, whither the ore was brought for smelting; that the aggregate of these collections formed one branch of revenue, under the general denomination of the *loha mehal*; the zemindar likewise paying, in consideration of his profits derived therefrom, a distinct assessment to Government, under the same designation. That while the Beerbhoom zemindary was under the immediate management of the officers of Government, the proprietary dues derivable from the iron mines, being in the same manner kept distinct from the rent of the land, had been farmed, as one separate tenure, for a number of years, under the above designation of the *loha mehal*; the farmer of which had the possession of all the *aurungs* within the zemindary, and made the collections on the iron there manufactured, without any interference on the part of the proprietor of the soil. That, in like manner, when different portions of the late zemindar's estate in which iron mines lay, had been sold; no right to the property of these mines, or to the possession of the *aurungs* where the established dues were levied, had been conveyed to the purchasers of the land; the right of property in all the iron mines of the zemindary remaining with the holder of the *loha mehal*. That this *mehal* had continued the property of the Rajah of Beerbhoom, till the year 1205, Bengal era, corresponding with the year 1799, A. D., when in addition to some lands belonging to the Rajah, it was sold by public sale, under the orders of the Board of Revenue and Collector, to the plaintiff. That the plaintiff, by his purchase of the *loha mehal*, had acquired the whole of the former zemindar's rights in the iron mines of his zemindary. That he was consequently vested with

(a) The decision in this case must be considered as founded on a general principle of equity, rather than on any provisions of the Hindoo law; the rules of which, applicable to joint estates held by two or more brothers, living in family partnership, have been stated in the reports of former cases.

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the right of levying the proprietary dues on the iron manufactured, and of possessing the several *aurungs*, or places of manufacture, where these dues were levied; and which had always been held by the holder of the *loha mehal*. That, notwithstanding this, the defendant, who had, in the year 1202, B. S., purchased the pergunnah Mullarpore, in which the *aurungs* of Damra and Geeanpoora are situate, had unjustly taken possession of these *aurungs*, and levied the proprietary dues derivable from the iron there manufactured; for the recovery of which, therefore, and the mesne profits, the plaintiff now sued.

It was set forth for the defendant, that the proprietary right to the iron mines, and consequently the right to levy the proprietor's dues on the iron brought for manufacture to the *aurungs*, followed the property of the land in which they lay. That, consequently the plaintiff had no right in any of the iron mines, or *aurungs*, except what lay within the lands purchased by him. That the pergunnah Mullarpore having been purchased by the defendant in the year 1202, from the late zemindar, the *aurungs* in dispute had been transferred to him along with the land; and that he had accordingly received possession of both under a deed of sale executed by the zemindar; and an *Amulnameh* (or order of possession) from the Collector of the zillah, in the year 1203, from which time he had held them uninterruptedly.

It appeared from the evidence and the papers in the case, that the revenue derived by the late zemindar of Beerbhoom from the iron ore within the limits of his zemindary, as well as the assessment paid by him to Government on that account, had, as stated in the plaint, been kept distinct from the general land revenue, and entered in the accounts both of the zemindar and of Government, as a separate article, under the denomination of the *loha mehal*. That with some partial exceptions, the entire revenue derived by the late zemindar from the whole iron mines of his estate was included under this one head, though collected at various places of manufacture, called *aurungs*. That in the year 1778, A. D., at which time the zemindary of Beerbhoom came under the immediate management of the officers of Government, the iron mines being farmed to Mr. Farquhar, under the denomination of the *loha mehal*, at an annual rent of sicca rupees 766, the *aurungs* situate within the lands since purchased by the defendant, were comprehended in the said *mehal*, and in the possession of Mr. Farquhar till the year 1789; that in the deed of sale executed in the year 1202, in favour of the defendant, by the late zemindar of Beerbhoom, while it distinctly specified each of the *mehals* contained in the estate purchased by the defendant, and particularized with great minuteness the rights and property conveyed to him, there was no mention of the *aurungs* in dispute, or of the iron mines situate in the land sold; whereas the title deeds delivered by the Collector of the zillah to the plaintiff expressly purported to convey to him, along with lot Dehchooah, the entire *loha mehal* of the Beerbhoom zemindary; subject to a distinct Government assessment of the annual sum of sicca rupees 815; and that on a petition from the plaintiff, representing "that the officers appointed to put him in possession of his purchase had

only given him possession of lot Dehchooah, and not of the disputed *loha mehal*," the Collector issued a *purwanna*, expressly directing that the plaintiff should be put in possession of the *aurungs* in dispute. 1811.

On consideration of the above circumstances, the Zillah Judge passed a decree, adjudging to the plaintiff the proprietary right in and possession of the *aurungs* of Damra and Kaupoorā; with costs against the defendant. Gooroo-
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On appeal to the Provincial Court of Moorshedabad, that Court in a decree reciting that the proprietary right of the entire *loha mehal* of the Beerbhoom district, including the property of all *aurungs*, mines, smelting-houses, and other iron works lying within that district, was vested in the respondent, affirmed the decree of the Zillah Court, with costs against the appellants; and directed that the Zillah Judge should ascertain by an *aumeen*, what profits had accrued to the appellants from the iron *meahls* of Damra and Geeanpoora, and cause the same to be paid by the appellants to the respondent.

On a further appeal to the Sudder Dewanny Adawlut, the papers relating to the sale of lot Dehchooah, &c. were procured from the records of the Board of Revenue. These confirmed the proof in favour of the respondent's claim, clearly shewing that the *aurungs* in dispute had been comprehended within the general *loha mehal* of the late zemindaree of Beerbhoom. And though, in the report of the collector respecting the sale, the *loha meahls* were not specified as a distinct *mehal* or branch of revenue, but entered as part of the assets (*jaecedad*) of lot Dehchooah (the purchase of the respondent), and a doubt might therefore be entertained whether the Board were aware that the Collector meant to include therein the entire *loha mehal* of the Beerbhoom zemindary, yet this plea could not, the Court observed before, avail to the appellants. It appeared to the Court clear that the dues levied on the iron manufactured at the *aurungs* in dispute, were included in the general *loha mehal*; that the right of levying these dues and of possessing the *aurungs* where they were collected, had always been vested in the holder of the *loha mehal*; that no right to these dues, or to the possession of the *aurungs* in dispute, had vested in the appellants by their purchase of the land in which they lay; and that the respondent, having received possession from the Collector of the disputed *aurungs*, as purchaser of the *loha mehal*, was entitled to a judgment against the appellants.

The Court accordingly passed a final decree, affirming the decree of the Zillah and Provincial Courts, as far as they went to declare the right of the respondent to possession of the disputed *aurungs*, and to the proprietary dues collected on the iron ore there manufactured.

The Court, at the same time, thought it proper to set aside that part of the Provincial Court's decree which went to define the nature and extent of the rights of the respondent in the mines and places of manufacture; concerning which there was no question expressly before them; nor had there been a sufficient investigation to admit of such definition.

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Costs of suit in all the Courts were made payable by the appellants, and the Zillah Judge was directed to ascertain and report the amount of the mesne profits derived by the appellants from the disputed *aurungs*, to the date of the execution of the decree.

On the motion of the Third Judge, who thought it doubtful how far the Board of Revenue had intended to authorize the Collector, with the land purchased by the appellants, to dispose of the entire *loha mehal* of the Beerbhoom zemindary, and whether therefore Government might not have a claim to the disputed *aurungs*, a copy of the Court's decree was transmitted to the Board of Revenue for their information; and to enable them to bring forward by a separate suit any claim on the part of Government to the *aurungs* in question, which it might be judged proper to maintain.

In perfecting and carrying into execution the Court's decree in this case, a fuller investigation into the claims of the parties became necessary.

The appellants claimed a right to set up new *aurungs* for the manufacture of the iron ore within their estate, to levy the proprietary dues on the iron manufactured therein; and to prevent the miners, and other persons employed in the manufacture, from bringing ore to the *aurungs* decreed to the respondent; thereby rendering the rights adjudged to him entirely nugatory.

The respondent, on the other hand, claimed an exclusive property in all the iron that lay within the appellant's estate; and the liberty of opening new mines, and erecting new *aurungs*, at his pleasure; with some further privileges, respecting the cutting of wood for the use of the furnaces and the provision of other materials.

The Court accordingly obtained from the records of Government such papers relating to the *loha mehal* of Beerbhoom as were procurable, and directed the Judge of Zillah Beerbhoom to receive such evidence as the parties might produce, and to examine a sufficient number of competent witnesses on the points at issue between them.

From the further enquiry, it appeared that the iron ore, with which the district of Beerbhoom abounds, being purchased by certain *beoparies* (itinerant dealers) from the persons by whom it is dug, or collected, is by them brought to the *aurungs*, or places of manufacture; that there it is purchased by the manufacturers, from whom the zemindar, or the holder of the *loha mehal*, where held distinct from the zemindary, levies a certain due, proportioned to the quantity manufactured; that this due is collected at different stages of the manufacture; a certain levy being made at the *kotsal*, where the ore was first roasted; and another at the *khamarsal*, where the iron is finally prepared for use: that the general *loha mehal* of the late Beerbhoom zemindary included the collections thus made at a variety of different *aurungs*, or places of manufacture, and forming a distinct branch of revenue collected by the holder of the *loha mehal*, who, in consideration of the profits thence derived, was subject to a distinct assessment to Government: entered separately in the public accounts, under the same designation; that these payments, at the places of manufacture, had, with the exception of some trifling and irregular contributions, levied at the time of digging, or collecting, the ore from the ground (which appeared also

to have been made on behalf of the holder of the *loha mehal*, constituted the sole income derived by the late zemindar from the iron mines lying within his estate: and that while the *loha mehal* was held in farm, separately from the zemindary, the zemindar had no right of interference with the working of the mines, or manufacture of the iron at the *aurungs* situate within the limits of the *mehal*: and that although there were some partial *loha mehals* in the late zemindary, which appeared to be annexed to particular land *mehals*, yet the iron mines of pergunnah Mullarpore, the appellants' estate, were clearly comprehended within the general *loha mehal* purchased by the respondent.

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It was not established, however, that any special privileges had been enjoyed either by the manufacturers, or by the holder of the *loha mehal*, in respect to the firewood, or other materials required for the manufacture. These were purchased by them in the same manner as by other individuals.

Under the above circumstances, the Court (present J. H. Harington and J. Stuart), viewed the sums levied on the iron manufactured at the *aurungs*, as the consideration, or price, taken by the owner of the *loha mehal* for his ore, appropriated by the manufacturers, and therefore, as a fair and legitimate subject of property; and were of opinion, that the respondent, by his purchase of the *loha mehal*, being vested with the right of collecting these proprietary dues on the iron produced from all the mines comprehended within that *mehal* (in which the appellant's estate was clearly included), had succeeded to all the proprietary rights held by the former zemindar in the iron mines comprehended within the said *mehal*; and, consequently, in the mines lying within the appellant's lands. With a view therefore to secure to the respondent his just right as proprietor of the *loha mehal*, and provide, at the same time for the rights of the appellants as proprietors of the soil, the Court judged proper, in their instructions for the execution of their decree, to declare the extent of the rights which their decree was intended to recognize in the holder of the *loha mehal*, by the following specification:

1st, The respondent is entitled to require that no ore, the produce of the zemindary of appellants, be manufactured without paying him the established dues heretofore levied by the holder of the *loha mehal*.

2dly, In order to secure the receipt of these dues, the respondent is entitled to possession of the contested *aurungs* of Damra and Geeanpoora.

3dly, The appellants shall not be deemed entitled to establish *aurungs*, for the manufacture of iron ore produced within the limits of their landed estate.

4thly, The appellants shall not be allowed to prevent any persons taking the ore from the established mines, and carrying the same to the *aurungs* of the respondent; nor be permitted to exact any fine or consideration for the ore which may be so taken and carried away from the established mines.

5thly, The respondent shall not be entitled to establish new *aurungs* for the manufacture of the ore produced in appellants' estate without previously obtaining the consent of the appellants, or the legal possessor of the soil, for the land upon which the new *aurungs* may be constructed.

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6thly, The respondent shall be entitled to cause new mines of iron ore to be opened in the landed estate of appellants on condition of making to the appellants a full and liberal compensation for the value of any land which may be rendered unfit for cultivation by opening the new mines.

In explanation of the above decree, the Court observed, that the right of the respondent to possess the *aurungs* held by Mr. Farquhar, as farmer of the *loha mehal*, to levy the established dues, and to claim that the iron ore be brought, as heretofore, to those *aurungs* from the existing mines, was obvious: since without these privileges the *loha mehal* must be a nominal tenure only; and that the prohibition to appellants, against erecting *aurungs*, was manifestly derivable from the nature of the *loha mehal*; whether considered as private property, comprehending the exclusive right of the late zemindar of Beerbhoom to the iron ore produced in his zemindary, or as a distinct source of revenue to the estate, for which the holder of the *mehal* is responsible; since a permission to other persons to establish manufactories of iron, within the limits of the *loha mehal*, for the purpose of manufacturing iron, the produce of the land therein included, would obviously interfere with the exclusive rights of the holder of that *mehal*; and a competition must tend to diminish his profits, as well as injure the public revenue, for which these profits were the security. The Court likewise considered the right of the respondent to cause new mines to be opened, to be deducible from the same principles; and remarked, that unless this power be recognized, any new mines which may exist in the zemindary of appellants, must be lost, not only to the respondent, but to the public.

The Court at the same time remarked, that as the respondent can have no right to the land of the estate of appellants, his right of causing new mines to be opened ought not to be exercised without making a full compensation to the appellants for their equal right to cultivate and improve their landed estate; such compensation forming a fair and equitable adjustment of their conflicting rights; and that for the same reason, if the respondent should require any part of the estate of appellants for the improvement of the *loha mehal*, by the erection of new *aurungs*, he must obtain the consent of the appellants.

To guard against too extensive consequences being drawn from the position that the *loha mehal* involved the right to the iron mines within the late zemindary of Beerbhoom, it appeared to the Court necessary to state under what qualification this right must be exercised.

This right, the Court observed, was by no means to be understood as an uncontrolled and absolute property; but a right to be exercised according to established usage. It appeared to the Court, for instance, that the proprietor of the *loha mehal* would not be justified in attempting to stop or restrain the manufacture of iron; or in attempting to exact from those concerned in it, any dues, or payments, which have not been customarily rendered.

The Court likewise judged it proper to explain, that nothing in their decree was meant to affect any rights or privileges, which the proprietors of the other *loha mehals* above mentioned, might be found to possess.

With respect to these rights, however, as well as to the rate of *malikana russoom*, or proprietary dues, upon the iron produced in the mines of the respondent's *loha mehal*, which he is legally entitled to receive, the Court observed, it would be irregular to pass any determination, the proper parties not being before them. (a)

RAJA JYPORKAS SING, Heir of BIKRAMAJEET, Appellant, 1811.

versus
JOG RAJ SAHOO, Respondent.

Sept. 10th.

THIS was an action brought by Raja Bikramajeet, zemindar of pergunnah Shahabad, &c. on the 3d of April 1799, in the Zillah Court of Shahabad, for the recovery of Sa. Rs. 15,954, due to the plaintiff on a balance of accounts between him and Jograj Sahoo, a banker, who having been *Tahvildar*, or treasurer to the plaintiff, had received sundry sums of money on his behalf.

It was stated in the plaint, that in the month of *Phagoon* 1204, *Fuslee*, on an adjustment of accounts between the plaintiff, and Bhowanny Doss, the defendant's *gomashta*, through whom his transactions with the plaintiff had been carried on, a balance of Rs. 10,000 appeared in the plaintiff's favour; that a person named Neelmunny Miter was in possession of four mortgage bonds on sundry lands belonging to the plaintiff's zemindary, which had been executed by the plaintiff as security for the sum of Sa. Rs. 20,600 with interest, to the said Bhowanny Doss, on behalf of the defendant, and by him transferred, with the plaintiff's acquiescence, to the abovementioned Neelmunny Miter; that an interest of 8,400 rupees had accrued on these lands, making the total claim of Neelmunny, under the mortgage, amount to 29,000 rupees; that Bhowanny Doss, the defendant's *gomashta*, deducting the 10,000 rupees balance due to plaintiff, had taken from the plaintiff fresh bonds, with a further term of payment, for 19,000 rupees, in the name of Neelmunny Miter; and engaged to get back from that person the former bonds, and deliver them to be cancelled by the plaintiff; that the plaintiff, on the faith of that engagement, had executed to Bhowanny Doss, on behalf of the defendant, a full discharge from all demands up to the date of the above transaction; but that Neelmunny Miter having refused to accede to the above arrangement, the plaintiff had been forced, in order to prevent a foreclosure of the mortgages, to settle separately with Neelmunny Miter; that the defendant was therefore accountable to the plaintiff for the balance of 10,000 rupees, with interest from the

(a) The very full exposition which has been given in the report, of the decrees passed in this case, renders it unnecessary to add any remark; except that the Board of Revenue did not judge it necessary to prefer a claim to the *loha mehal*, be due to purchased by the respondent, on the part of Government; it is however, for obvious reasons, to be regretted, that when the Beerbhoom zemindary interest was parcelled out for public sale, by the collector, this *mehal* was not brought to the particular notice of the Board, and distributed, in a proportionate assessment, on the several portions of the zemindary, in which the iron mines are situated.

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date of the adjustment of their accounts ; making the sum, for the recovery of which, and the restitution of the deeds of mortgage for 19,000 rupees, executed as above, the plaintiff now sued.

The defendant resisted the claim ; stating that in the month of *Phagoon* 1204, all transactions between him and the plaintiff had ceased ; that the plaintiff had then executed acquittances in full for all sums of money received by him on account of the plaintiff ; and that these acquittances had no connection with the transaction respecting the mortgages.

Farigh Khuttees (deeds of acquittance) under date the 14th *Phagoon* 1204 ; purporting to be executed on an adjustment of accounts with Bhowanny Doss, and releasing the defendant from all claims by the plaintiff on account of the *tahvildarry* of the plaintiff's estate, and other transactions, were exhibited by the defendant, and admitted by the plaintiff.

From the evidence of Bhowanny Doss abovementioned, and of two other witnesses who had been employed by the plaintiff in settling his accounts with Bhowanny Doss, confirmed by a letter addressed soon after the transaction by Buowainy Doss to plaintiff, it appeared that the above deeds had, as stated by the plaintiff, been executed by him under the condition that Bhowanny Doss should procure the mortgage bonds in the possession of Neelmunny Miter to be cancelled ; but that arrangement had been prevented by the refusal of Neelmunny Miter to give up the old bonds on the terms proposed by Bhowanny Doss, also that Sa. Rs. 8,341, 14½ anas, was the amount of money due by the defendant to plaintiff on the adjustment of accounts, for which the above *farigh khuttees* had been granted.

A few days previous to the decision of this suit, the defendant exhibited another document, alleged to be an *ikrarnamēh*, executed in his favour by the plaintiff on the 7th *Aghun* 1205, and purporting " that all accounts having been settled between the plaintiff and defendant, deeds of acquittance had been executed by the former to the latter ; that the plaintiff would settle the business of the mortgages with Neelmunny Miter, to whom he had executed new bonds for 19,000 in place of the old bonds for 20,600 rupees ; and that the plaintiff had no claims whatever on that, or any other account, upon the defendant."

The above document was alleged by the plaintiff to be a fabrication ; and of the two persons whose names were signed as attesting witnesses, one wholly denied having ever attested the document in question ; the other, besides that he could neither read nor write, and stated that his name had been written by another person, fell into various gross contradictions respecting the circumstances under which the deed in question had been executed, moreover, this document bore only the seal of Raja, while the three others were likewise signed ; the appearance of the seal strengthened the suspicion of forgery, and no mention of it had been made by the defendant in the first pleadings.

The Zillah Judge rejecting the *ikrarnamēh* as a manifest fabrication, and considering it to be fully established that the *farigh khuttees* had been executed on the faith of the verbal engagement of Bhowanny Doss, to procure the former deeds of mortgage to be

cancelled, which condition had not been fulfilled, passed a decree, 1811.
adjudging to the plaintiff the sum of 8,341 rupees, 14½ anas, with 7,820 rupees, 7½ anas interest at twelve *per cent*, from the 15th *Magh* 1204, up to the date of the decree, making in all 16,162 rupees, 6 anas, payable by the defendant; who was likewise ordered to restore the mortgage deeds for the sum of 19,000 rupees.

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On appeal to the Patna Provincial Court by Jog Raj Sahoo, that Court reversed the decree of the Zillah Judge, on the ground that in the *farigh khuttees* executed by the plaintiff, there was no mention of the adjustment respecting the mortgages, which there would probably have been, if these *farigh khuttees* had been merely conditional, and that therefore no subsequent claim by the plaintiff on the defendant, could be sustained.

Raja Bekramajeet having demised while the appeal was depending before the Provincial Court, his son Jyperkas Rai, who succeeded him, preferred an appeal to the Sudder Dewanny Adawlut.

In this Court the respondent, while he continued to deny that any balance had been due by him to Raja Bekramajeet at the time of settling their accounts, yet acknowledged that Bhuwanny Doss had, acting as his agent, and on his behalf, entered into an engagement to procure the restoration of the old mortgage bonds and the acceptance of the new by Neelmunny Mitter. But he alleged that this engagement was in no way connected with the execution of the *farigh khuttees*, and argued further, that as he had always been ready to fulfil his engagement, and would have done so, if the Raja had not chosen, without consulting him, to settle separately with Neelmunny; even supposing the condition in which the *farigh khuttees* were executed to have been the cancelling the old bonds, still as the Raja had by his own act prevented him (the respondent) from fulfilling this condition, he was not entitled to set them aside on its failure.

This latter plea was at variance with the facts of the case; it plainly appearing that the respondent had no means of compelling Neelmunny Mitter to accept the new bonds, and no remedy against him on his refusal; that the appellant having, previously to the present suit, brought an action against Neelmunny and the respondent jointly, to compel the cancel of the old mortgage bonds, had been cast, and referred to his remedy against the respondent; and that he had consequently been compelled, in order to prevent the foreclosing the mortgages, to settle separately with Neelmunny Mitter.

The Court of Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle) considering the evidence of appellant's witnesses, and the acknowledgment of respondent, that Bhuwanny Doss had, in his behalf, entered into an engagement to procure the restoration of the old mortgage bonds, and the acceptance of the new by Neelmunny Mitter; that such arrangement had not been carried into effect by the respondent, while he did not, at the same time, attempt to shew any consideration on which the engagement was entered into, besides that set forth by the appellant, or in what way he had accounted to the appellant for the sums of money which he acknowledged to have received in his behalf, concurred with

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porkas
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the Zillah Judge that the *farigh khuttees* were granted conditionally; and that the condition having failed by the refusal of Neelmunny Miter, without any fault of the plaintiff, they were void. The Court were further satisfied, by the evidence, of the balance due to the plaintiff, as stated in the decision of the Zillah Judge; and passed a final decree, reversing the decree of the Provincial Court, and adjudging to the appellant the sum of 16,162 rupees, 6 anas, with interest from the date of the Zillah decree.

Costs of suits in the three Courts were made payable by the respondent.

1811.

Sept. 11th.

MUSSUMMAUT SOOBHANE, Appellant,

versus

BHETUN, *Alias* SHAH AZAMALLY, Respondent.

Claim of a widow to the estate of her deceased husband, a *fukeer*, to whom the defendant had been appointed *Janusheen*, or successor, by the will of the deceased. It appearing that the deceased in appointing the defendant to be his *Janusheen*, had intended to bequeath to him his estate; the bequest confirmed to the extent allowed by the Moo-hummud law, viz. one third, and the other two-thirds adjudged to the widow.

THIS was a suit brought by Mussummaut Soobhane, the widow of Shah Khadim Ally, on the 7th of August 1805, in the Zillah Court of Purnea, for the recovery of 75 beegahs of *lakhiraj* land, the annual produce of which was specified at 528 rupees.

It was stated in the plaint, that the defendant, being the servant of Shah Khadim Ally, the plaintiff's husband, had been employed by him in the collection of the rents of landed estate, and in the management of his other concerns; that on the death of Shah Khadim Ally, in the *Fuslee* year 1210, the plaintiff, being his only heir, succeeded to his property, and continued the defendant in his former employment; that the defendant, for one year, collected the rents, and regularly accounted for them to the plaintiff; but at the end of that time, getting possession of the title deeds of the land, he had set up a claim to the proprietary right, and ousted the plaintiff from possession, for the recovery of which therefore she now sued.

In answer, the defendant represented that he had been the follower (*Balka*) and disciple (*Chela*) of Shah Khadim Ally Sohurwurdee, who was a *fukeer* of the *Aghoree* class; that Shah Khadim Ally, being childless, had brought him up as his son; and giving him possession of the title deeds of his landed property, made him manager of all his concerns; that when on his death-bed, Shah Khadim Ally called the plaintiff, his wife, and Buhoo (the widow of his deceased son), and informed them that having no child surviving, he had educated the defendant as a son, and given him the possession and management of all his property; that he had omitted one thing, which, if he recovered, he would supply; viz. to make the defendant a *fukeer*, and constitute him his successor (*Janusheen*): that he desired his wife (the plaintiff) in the event of his death, to call an assembly of *fukeers*; and on the fortieth day after his death, to cause them to invest the defendant with the *fukeer's* insignia, and make him *Janusheen*, or successor, according to the customs of their tribe. That, accordingly, the plaintiff having called an assembly of *fukeers*, and informed them of the will of her husband, the defendant was regularly constituted

Janusheen of Shah Khadim Ally, that it was the custom among *fakerees* for the *Balka*, and *Chela*, to succeed to the property of his *Moorshid*, or spiritual guide; and support such relations as he may have left, that the defendant had accordingly held possession of the lands in dispute and maintained the plaintiff, till she, having quarrelled with him, left his house, and brought the present suit.

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mant So-
bhanee, v.
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alias Shah
Azamally.

It was proved by the evidence, on the part of the plaintiff, that the defendant had, till Shah Khadim Ally's death, acted as his servant, receiving wages as such; yet it appeared to be established by the evidence on the part of the defendant, that the deceased in his last illness had said to the defendant, "If I recover, I will make you my *chela* (disciple) and a *fakere*; and if I die, my wife will do so:" and it was fully proved that the plaintiff, on the fortieth day after her husband's death, having called a large assembly of *fakerees*, declared her husband's will that the defendant should be invested with the insignia of a *fakere*, and constituted his *janusheen*, or successor. That they accordingly performed the rites necessary to the carrying such will into effect: that it was not unusual for *Janusheens* to be thus constituted; and that the defendant obtained possession of the estate soon after the above ceremony. Some of the witnesses (*fakerees*) deposed that the person appointed *janusheen* was also entitled to the property of the deceased; according to the custom of *fakerees*; under an obligation to treat the wife of his spiritual guide with respect and care.

The Zillah Judge, under the above circumstances, dismissed the suit; confirming the defendant in possession of the lands in dispute; and directing that a suitable maintenance should be allowed out of it to the plaintiff.

On appeal to the Moorshedabad Provincial Court, the decree of the Zillah Judge was affirmed.

The appellant petitioned the Court of Sudder Dewanny Adawlut for a special appeal, on the ground, that even if the allegation of the respondent, respecting the late Shah Khadim Ally's having made a will constituting Bhetun his *janusheen*, were true, yet that such a will could not legally convey his property to the respondent; and the Court, having the decrees of the lower Courts before them, were of opinion, that the cause deserved further investigation. They therefore admitted a special appeal.

From the *sunnuds* under which the lands in dispute had been held by Shah Khadim Ally, which were called for by the Court, it appeared that they were not appropriated (*wugf*) to the support of any religious establishment; but had been granted to Shah Khadim Ally for his personal support, as a *muddud mash* tenure.

The proceedings on the case were submitted to the Moosulman law officers of the Court, with the following questions:

1st, The respondent having been constituted *janusheen* of Shah Khadim Ally, by an assembly of *fakerees*, on the declaration of the appellant, respecting the nuncupative will of her deceased husband, is the respondent entitled, under the general provisions of the Moohummudan law, or the special customs of *fakerees*, to the succession of the lands, and other property of the deceased? or does his estate descend to his other lawful heirs?

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maut Soob-
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2dlv, In the event of the right of the other heirs being preferable to that of the respondent, Shah Khadim Ally having left only a wife, and a son's widow, what shares do these take respectively?

In answer, the law officers delivered a *futwa* to the following purport: The appointment of *janusheen* among the *fukeers* termed *mushaekhs* convey no right of succession to property; being merely of a spiritual nature, and intended to give to the disciple the same authority as his *moorshid*, or spiritual guide possessed. The lands in dispute being the personal acquisition of Shah Khadim Ally, and not held in right of succession as *janusheen* to any former *fukeer*, are divisible among the legal heirs after the payment of dower and other debts; the plaintiff, as widow, is sole heir of the deceased, (the wife of a deceased son inheriting no portion of his father's estate) her specific share is one-fourth of the estate; but it being ruled by *futwas* that there is in modern times no *bytoolmal* or public treasury, regularly established, the other three-fourths also revert to the widow.

As some of the witnesses had stated it to be customary for the *janusheen* of a *fukeer* to inherit his property; it was probably the intention of the deceased, in declaring his will that the respondent should be his *janusheen*, to make him heir to his property. A further question was therefore put to the law officers of the Court, with a view to ascertain, whether, in that case, the respondent would take the whole, or a share of the estate, under the will of the deceased, and the custom of *fukeers*.

The law officers, in answer, stated, that among *fukeers* who are termed *azad* (let free, viz. persons who observed none of the prescribed ordinances of religion) and who have no wife or child, it is customary to leave their property to their *janusheen*; but among *mushaekhs*, who follow the rules of the Moohummudan law, and who marry and leave a family, if they appoint any stranger to be their *janusheen* in spiritual matters, it is not usual for them to bequeath to him their property; though they sometimes make a gift to him, for the sake of enabling him to dedicate himself wholly to devotion. That Shah Khadim clearly appeared to be of the *mushaekh* class of *fukeers*. That, however, if his intention in willing that the respondent should be his *janusheen*, was to bequeath to him his property, the respondent would be entitled to one-third of the estate; a will in favour of a stranger being valid in the Moohummudan law to the extent of a third of the testator's property.

The Court, in consequence of this answer, directed that further evidence should be taken by the Zillah Judge, to ascertain whether, from the will of the deceased, as declared by Mussummaut Soobhane, or from the invariable custom of the tribe of *fukeers* to which he belonged, it appeared to be the intention of the deceased to bequeath his property to the respondent.

From the further evidence taken, it appeared, that the *shuhur* tribe of *fukeers*, in which the deceased had enrolled himself, and by whom the respondent had been installed as his successor, were considered to belong to the class of *azads*; and that it was an invariable custom among them for the *janusheen* to succeed to the estate of his predecessor.

The law officers being again referred to, with a view of ascer-

gaining, whether, under these circumstances, the respondent was entitled, by the rules of the Moohummudan law, or the usage of the country, to the whole, or what share, of the deceased's estate, delivered the following opinion :

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Shah Khadim Ally being a Moosulman, was bound by the provisions of the Moohummudan law. He only is properly an *azad* who has no family; and whose *janusheen* therefore is his successor. But Shah Khadim Ally was married (*mootahil*); and a fourth share of his estate descends by law to his wife. As, however, it is established by evidence respecting the will of the deceased, as declared by the appellant, that it was the intention of the deceased that the respondent should succeed both to the situation of *janusheen* and to his property; the respondent is entitled under such bequest to one-third of the estate; the residue devolving to the widow.

The Court (present J. H. Harington and J. Stuart) on consideration of this *fatwa*, with the evident intention of the deceased to bequeath his property to the respondent, passed a final decree, amending the decisions of the Zillah and Provincial Courts; and adjudging to the appellant two-thirds of the lands in dispute; with mesne profits from the institution of the suit.

The costs of the three Courts were made payable by the parties, in the proportions of such part of their respective claims as were disallowed. (a)

(a) It is a well known principle of Moohummudan law, that bequests to persons not being the legal heirs, are restricted to a third of the testator's estate. It is also an established rule, that the widow's share of her husband's estate, when there are no children or other descendants, is a fourth. The *fatwa* which, in this case, declared her entitled to the residue of the estate, in defect of a regular *Bytoolmal*, was supported by a quotation from the *Humadeyuh*, as cited in the *Zukheerah* to the following effect: "There is no proper *Bytoolmal* in our time: nor was there, except in the time of the companions of the Prophet and their successors. Cazeem Inam Abduol Wahid, in his *Faraiz*, has noticed that the surplus of the shares of a husband, or wife, whatever it may be, should not be placed in the *Bytoolmal*, in the present times, for the reason stated; but should be given to the husband, or wife."

1811.

GHOLAM NUBBY CHOWDER, Appellant,

versus

Oct. 22d.

GOUR KISHORE RAI, Respondent.

On a claim of *shoo'a*, or right of pre-emption founded on vicinage and partnership, it being proved that plaintiff had made the requisite demand, and protest, on hearing of the sale, though payment was not immediately tendered, judgment given in favour of the plaintiff, in conformity with the opinion of the Moohummudan law officers, on condition of payment by a certain day.

THE appellant, Gholam Nubby, was proprietor of a 6 ana portion of pergunnah Gopalpoor, by inheritance from his grandfather, Seraj Oodeen, who had been zemindar of the whole pergunnah. His cousin, Moohummud Riza, who likewise held a 6 ana share of the pergunnah, under the same title, transferred his property to Moohummud Oonees, his daughter's son, in the Bengal year 1187. Each of these 6 ana divisions was held as an entire estate, under separate engagements for the public revenue; in the Bengal year 1196, Moohummud Oonees executed in favour of Gholam Nubby, a deed of sale for a 3 ana share, being a moiety of his 6 ana estate, of which Gholam Nubby obtained possession, as joint tenant with Moohummud Oonees, under a decree of Court, passed on the 9th *Phagoon* 1203, or 17th of February 1797. But previously to this decree, viz on the 26th *Poos* 1203, (7th of January 1797) at which time the above suit between the appellant and Moohummud Oonees was depending, the latter executed in favour of the respondent, Gour Kishore, a deed of sale for a 2 ana portion of his estate, in consideration of his receiving the sum of sicca rupees 3,001; Gour Kishore, at the same time, executing an engagement to surrender the lands, on repayment by Moohummud Oonees of the sum abovementioned, principal and interest, on or before the 30th *Chey*t 1204, or 10th of April 1798.

On the 7th of April 1798 (27th *Chey*t 1204), Gholam Nubby having deposited in the Zillah Court the sum of sicca rupees 3,451, the amount, principal and interest, of the sum paid as above by the respondent to Moohummud Oonees, and which (he alleged) he had previously tendered to the respondent on the 16th *Chey*t, applied by a summary suit, to compel Gour Kishore Rai to surrender the bill of sale; stating that Moohummud Oonees was unable to redeem his land, and that he (Gholam Nubby) as co-partner in the estate, had a legal right of pre-emption.

Respondent resisted the claim of the appellant, on the pleas, that a conclusive deed of sale had been executed to him by Moohummud Oonees on the 9th *Phagoon* 1203, or 18th of February 1797, when the engagement originally given for a surrender of the land, on repayment of the purchase money, was cancelled by Moohummud Oonees on a further consideration made to him, in money and service; and that at all events, the appellant had no legal title to the redemption of the lands, if conditionally sold by Moohummud Oonees.

The Zillah Judge, on the ground that the appellant, not being a party to the conditional sale, had no title to compel the surrender of the lands, on tender of the price, by summary process, dismissed the suit, leaving the appellant to bring a regular action, in the event of his having any claim of right to the lands.

Appellant accordingly, on the 23d of August 1799, brought an action against Gour Kishore, for the recovery of the two ana share in question; claiming a title thereto under the Moosulman law of

Shooffa, or right of pre-emption, as a partner and neighbour, for the price at which the respondent had bought them; and tendering payment of the amount.

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The defendant resisted the claim, stating as before, that he held the lands under a deed of unconditional sale; and the Zillah Judge, on proof thereof, in a decree reciting that the lands having been purchased by Gour Kishore from Moohummud Oonees, the undisputed proprietor, the appellant had no title to set aside the sale, dismissed the suit.

Gholam Nubby Chowdry, v. Gour Kishore Rai.

On appeal by Gholam Nubby to the Provincial Court of the division, that Court passed an order, directing the Zillah Judge to admit the appellant to bring a fresh suit against Gour Kishore and Moohummud Oonees, jointly; and to determine whether, by the established usage of the country, Gholam Nubby was entitled to the lands sold by Moohummud Oonees to Gour Kishore, on payment of the purchase money.

The appellant accordingly, on the 27th of March 1805, brought another action in the Zillah Court, against Gour Kishore and Moohummud Oonees, jointly, claiming the lands purchased by the former from the latter, by right of vicinage and partnership; and stating that the sale of the 2 ana share having taken place without his knowledge or consent; (the first notice of the unconditional sale being the answer of Gour Kishore in the former suit,) it could not bar his legal right of pre-emption.

Moohummud Oonees did not attend to answer this claim; but Gour Kishore pleaded against the appellant's claim, that he had long neglected to assert his right of pre-emption, after being informed of the sale of the lands, and that his subsequent demand of it was thereby precluded. It was likewise stated, that the appellant had virtually acknowledged the proprietary right of the respondent by an *Ewuznameh*, or deed of exchange, under date the 11th Poos 1211, (22d of December 1804,) at which time the former suit was depending before the Court of Appeal, conveying to the respondent a 3 kanee, 12½ gunda share of the 3 ana division purchased by the appellant in exchange for an equal quantity of land, included in the 2 ana portion purchased by Gour Kishore. This deed was exhibited under the signature of Gholam Nubby by the pen of Rammohun Deo, his *gomashtah*. It contained no reference to the suit under appeal.

The *vakeels* of the appellant being questioned by the Court, admitted the validity of the above deed, and the Zillah Judge considering it as a virtual renunciation of the appellant's right of pre-emption, passed a decree, dismissing his claim.

In appeal to the Provincial Court, the appellant stated that the *Ewuznameh*, on which the decision of the Zillah Judge was founded, had been signed in the appellant's name by Rammohun Deo, the manager of the joint estate of the appellant, and Moohummud Oonees, without any authority from the appellant, and that it could not therefore be considered as a renunciation of the appellant's rights, which, at the time the deed in question was executed, he was suing for in Court.

This allegation was not denied by the respondents; but they urged that the appellant's *vakeels* having admitted the *Ewuznameh*

1811. in the Zillah Court, the plea was not admissible; and they renewed the objections to the appellants claim, which had been urged in the Zillah Court.

Gholam Nubby Chowdry, v. Gour Ki-shore Rai. The Provincial Court, on the ground that the appellant had failed to prove any title to set aside the sale under which the respondent held the lands in dispute, passed a decree, affirming the decision of the Zillah Judge.

Gholam Nubby preferred a further appeal to the Sudder Dewanny Adawlut.

The Court, with a view of ascertaining the Moohummudan law applicable to the case, referred the proceedings to their Moosulman law officers, with the following question: "If Moohummud Oonees sold the 2 ana estate, in dispute, to the respondent, without the consent or knowledge of the appellant, is such sale legally void? and if void, is the appellant entitled to possession of the lands sold, on payment of the price at which they were purchased?"

The law officers, in answer, delivered a *futwa* to the following effect: "The appellant, as proprietor of the 6 ana zemindary, his hereditary estate, was a *Shafee* (entitled to *Shoofa*) in the contiguous 2 ana estate, sold by Moohummud Oonees, in right of *neighbourhood*; and as proprietor of the 3 ana portion of the 6 ana estate of Moohummud Oonees, which he held in joint tenancy with him, the respondent was also *Shafee* in right of *partnership*. Moreover, appellant states, that previous to the conditional sales becoming absolute, he tendered payment of the price, with a demand of the property; and he denied that he was informed of the sale having been made conclusive on the 9th *Phagoon* 1203. If such were the case, according to the statement of the appellant, the *tulub mowasibat* (or immediate claim to the purchase of the land in right of *Shoofa*,) and the *tulub ishhad* (or making the claim and calling witnesses to attest it) which are necessary to render the right of *Shoofa* valid, appeared to have been made; and although Moohummud Oonees was competent to sell his share of the estate, yet the appellant was entitled, immediately on hearing of the sale, to become the proprietor by payment of the amount of the purchase money. The law officers added, that it rested with the Court to ascertain whether, as alleged by the respondent, a deed making the sale conclusive was executed by Moohummud Oonees previous to the expiration of the limited period of redemption; and if so, whether the appellant was apprised of its having been executed: that to establish the *tulub mowasibat*, it must appear that the *Shafee* preferred his claim to the land the moment he was apprised of the sale; and that the *tulub ishhad* consisted in the *Shafee*, after hearing of the sale, going either to the land, or to the buyer, or to the seller; and his declaring, "I will take this thing that has been sold by right of *Shoofa*," and in causing witnesses to attest his doing so.

From the evidence of witnesses adduced on the part of the respondent, it appeared, that Radharumun Sain, a servant of respondent, having in *Jeth* 1204, gone to make the collections of the disputed lands on the part of the respondent, he met with the appellant, and told him that Moohummud Oonees had sold the land in question to the respondents; that the appellant then said, I will pay

the money and not give possession; and called his *Fotahdar* to bring the money: Radharumun Sain refused to accept it, desiring the appellant to send it to the respondent; and that nine months afterwards, in *Chey*t of the same year, the appellant tendered payment to the respondent. The above evidence was confirmed by a letter from Moohummud Oonees to the respondent, (filed on his part) under date the 11th of *Jeth* 1204, relative to the same circumstances.

There was likewise exhibited on the part of the respondent a petition of the appellant to the Collector, under date the 27th *Jeth* 1204, (6th of June 1797,) stating that the respondent had applied for separate possession of the 2 ana share of Gopalpoor, under the conditional deed of sale executed in *Poos* 1203; alleging the petitioner's right of pre-emption; and declaring his willingness to redeem the mortgage as well as to settle with Moohummud Oonees.

It appeared further, from the acknowledgment of the respondent, that the deed making the sale conclusive, dated the 9th *Phagoon* 1203, had been executed at the respondent's house in Luckipoor, and had never been shewn to the appellant; nor was there any proof of his having information that such a deed had been executed till after the institution of the summary suit; or that he knew of the respondent's purchase at all, conditionally or unconditionally, until Radharumun Sain went to make the collections as above stated.

On considering the above evidence, the following questions were referred to the Moohummudan law officers of the Court:

1st, Whether from the evidence respecting the appellant's offer of payment to Radharumun Sain, and his petition to the Collector, the *tulbmowasibat* and *ishhad* were in such manner established as to preserve his legal right of *Shoofa*, although he did not tender payment of the purchase money till the month of *Chey*t 1204?

2nd, Whether the appellant's claim was precluded by the execution of the *Ewuznameh*, signed by Ram Mohun Deo, the manager of the joint zemindary of appellant, respondent, and Moohummud Oonees; it being executed whilst the claim of the appellant in the former suit was depending in the Provincial Court.

In answer to this reference, the law officers delivered a *futwa* to the following effect:

1st, It is not necessary for the *Shafee* to send the purchase money of the land to the buyer, on making the immediate demand, and taking witnesses; it is sufficient to produce the price, when the judge had decreed the right of *Shoofa*, in the property claimed. The appellant, on hearing from Radharumun Sain (who had gone to the disputed lands to collect the rents) of the sale to respondent, having claimed his right of pre-emption, and called to his *Fotahdar* to bring the purchase money, that he might give it to the abovenamed, the *tulbmowasibat* and *ishhad* were established, and his not having sent the money to the respondent, till *Poos* 1204, did not invalidate his legal claim.

2nd, The appellant's right of *Shoofa* is not precluded by the exchange of certain *kanees* of the appellant's land for some of the land in dispute, because, in the first place, Rammohun Deo was

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shore Rai.

not constituted an agent with powers to transfer, on behalf of the appellant, nor was he even his private servant, but merely appointed to collect the rents of the joint zemindary. Therefore his act could not be considered as the act of the appellant, being in fact an unauthorized act; and secondly, even if the exchange made by Rammohun was taken as the act of the appellant, on the ground that the act of the deputy (*Naib*) was to be held the act of the principal (*Moneeb*), still the appellant's right of *Shoofo* would only be precluded in the *kanees* of ground which had been exchanged; not in the rest of the disputed lands: for the appellant's receiving those *kanees*, from which his acknowledgment of the proprietary right of the respondent might be inferred, can only be taken as a consent to the respondent's possession of the *kanees* actually exchanged, but not of the rest of the disputed lands; since the *kanees* exchanged were specified with distinct boundaries; were not scattered through the zemindary in such manner, as that the appellant's consenting to the respondent's being the proprietor of these *kanees*, implied his consent to his being proprietor of the whole zemindary.

The Court of Sudder Dewanny Adawlut (present J. H. Harington and J. Fombelle) in consideration of the *futwas* of their law officers; with the evidence of the case, being of opinion that the appellant was legally entitled, by right of pre-emption, to purchase the lands in dispute, passed a final decree; reversing the decisions of the Provincial and Zillah Courts, and adjudging possession of the lands to the appellant, on condition of his paying to respondent, the amount of the purchase money, on or before the commencement of the ensuing Bengal year. Costs of suit were made payable by the respondent. (a)

(a) The Moosulman law of *Shoofo*, or right of pre-emption, in joint or contiguous landed property, forms the subject of a separate book in the *Hidaya*, viz. Book xxxviii, Vol. III. of Mr. Hamilton's translation.

SHEKH BHUKARREE, Appellant,

versus

IMAMBUKSH, Respondent.

1811.

Nov. 26th.

THIS was an action brought by the appellant, *in formd pauperis*, on the 20th of March 1804, in the Zillah Court of Sarun, for the recovery of a half share of Mouza Bhutee, Peigunnah Goda, the yearly produce of which was stated at rupees 250

It was set forth in the plaint, that the mouza in question consisting of 200 beegas, had been the property of the grandfather of the plaintiff and defendant (who were first cousins) that it subsequently became the joint property of their fathers, and on their death, of the plaintiff and defendant, that the defendant's father, and afterwards the defendant, had the management of the lands, and entered into engagements for the public revenue, the plaintiff enjoying possession of 10 beegas of *malikana* land in lieu of his share of the net produce of the entire mouza, that, the defendant having ousted him from the *malikana* land, he now sued for the recovery of his share of the whole estate

In answer, after a general denial of the statement of the plaintiff, respecting his having possession of the *malikana* lands, it was pleaded, that in the year 1190 *Fuslee* (1783,) the defendant's father and the plaintiff had mortgaged the mouza in question for the sum of 150 rupees, 2 annas, to a person named Sheikh Moohumud Dowlut, that on the expiration of the period of the mortgage, the defendant's father being dead, and the plaintiff having refused to advance any money in discharge of the mortgage, the defendant paid the amount out of his own funds for the redemption of the land, and had since kept possession of the whole mouza as his property, in right of purchase, that this right had been acknowledged by a decree of the Zillah Court, passed on the 20th of November 1789, (18th *Aghun*, 1197 *Fuslee*) and that consequently the plaintiff's claim, even if otherwise valid, was now inadmissible.

From the proceedings in the former case, referred to by the defendant, it appeared that the plaintiff had sued the defendant for the recovery of 4 biswas of land, which he claimed as belonging to his *malikana* land that an *ammun* had been appointed, who reported, "that the 4 biswas in dispute adjoined to the *malikana* land of the plaintiff but were not included therein, that they had been for some time uncultivated and that the plaintiff having brought them into cultivation the defendant had ousted him," and that the defendant having resisted the plaintiff's claim, on the same grounds as in the present action the Judge after taking evidence respecting the mortgage passed a decree dismissing the plaintiff's claim, in the following terms, 'it appeared from evidence that the engagement with Government for the mouza had been made out in the name of the defendant's father, and that he alone had always paid the public revenue; that he having mortgaged the lands in question to make good arrears of public revenue the defendant had, after his death, redeemed the lands out of his own funds. that the plaintiff was therefore not a sharer in the property

1811. of the [redacted] and that consequently his present claim was inadmissible.

From the evidence adduced by the plaintiff in the present suit, and the testimony of witnesses examined on the former trial, it was proved, that he had held possession of the *malikana* land till the *Fuslee* year 1206 (9 years after the date of the above decree); that his father, and the father of the defendant, succeeded to the mouza in question as joint heirs of their father, and that the plaintiff's father enjoyed possession of the 10 beegas of *malikana* land, as an allowance in lieu of his proprietary share, the defendant's father being solely responsible for the public revenue, and having the sole management of the joint estate; that the defendant's father having, in the year 1190, incurred an arrear of the public revenue, executed a deed of mortgage for the mouza, the money advanced on which was wholly applied to discharge the public revenue, and that the plaintiff, who was then a minor, had no concern in the transaction, though the defendant's father had signed the plaintiff's name to the mortgage deed, as being a copartner in the land. After this, the defendant, his father being then dead, in order to prevent the mortgagee from obtaining possession by a foreclosure of the mortgage, discharged the amount due upon it.

The Zillah Judge being of opinion that the former decree, in the suit for the 4 biswas of land, did not preclude him from determining the merits of the present suit, and that the defendant's father having executed the mortgage in order to make good arrears of revenue, for which he alone was responsible, the plaintiff's title to his share in the estate, was not affected by the defendant having redeemed the lands, passed a decree adjudging possession of a half share of the mouza to the plaintiff, with costs of suit against the respondent.

On appeal by Imambukhsh to the Provincial Court of the division, they were of opinion that by the decree of the 20th of November 1789, the plaintiff's right to a share of the mouza having been incidentally disallowed, the present claim had been virtually heard and determined, and could not again be entertained. They therefore reversed the decision of the Zillah Judge.

Shekh Bhukaree having applied for a special appeal to the Sudder Dewanny Adawlut, the Court, considering the grounds of the decision of the Provincial Court to be insufficient, admitted an appeal.

On going into the case, the Court (present J. H. Harington and J. Stuart) were of opinion, that as the decree of the 20th of November 1789, dismissing the plaintiff's claim to the 4 biswas of land, then sued for as part of his *malikana* allotment, contained no distinct decision respecting his proprietary right to a moiety of the village in dispute, the incidental judgment recorded in that decree did not preclude the cognizance of the present claim. The Court, at the same time, entirely concurred with the Zillah Judge respecting the merits of appellant's claim in the present suit. They accordingly passed a final decree, reversing the decision of the Provincial Court, and adjudging to the appellant a moiety of the

disputed mouza, with half the mesne profits from ~~the~~ of the zillah decision now confirmed.

Costs in all the Courts were made payable by the Respondent.

FYAZ ALI KHAN, Appellant,

1811.

versus

MUSSUMMAUT FATIMA KHATOON, Respondent.

Dec. 3d.

THIS was an action brought by the respondent, Mussummaut Fatima Khatoon, on the 30th of September 1798, in the Zillah Court of Mymensing, for the recovery of a 1 ana, 3 gundah, 2 cowrie share of the estate of Khoda Nowaz Khan, grandfather of the appellant, late zemindar of an 8 ana portion of pergunnah Altea. The annual produce of the share claimed was estimated at sicca rupees 7,501.

The plaintiff claimed the above share as daughter of the late zemindar, by a concubine named Soobhane Beebee; and her claim was resisted by the defendant, who denied that Khoda Nowaz Khan was father of the plaintiff, and alleged that she was not born till nearly two years after the death of the zemindar. From the evidence in the case, it appeared, that Khoda Nowaz Khan was known to have cohabited with Soobhane Beebee, the mother of the plaintiff, while she was in the service of Khyroonnissa Beegum, one of his wives: that Soobhane proving pregnant, Khoda Nowaz Khan had acknowledged to several of his family, that he was the father of the child; and had caused to be provided, at considerable cost, the things necessary for performing the ceremonies usual among Moosulmans at 7 months pregnancy; which were accordingly performed in the Khan's absence by Mussummaut Khyroonnissa Beegum; that Khoda Nowaz Khan soon after died; and the plaintiff being born two months subsequent to his death, in the year 1180, she was educated by Khyroonnissa Beegum, in the same way as the Khan's other children, and had received from the collector of the zillah (the estate being under charge of the Court of Wards) a monthly allowance as daughter to Khoda Nowaz Khan.

It further appeared, that Khoda Nowaz Khan left four wives, Shahzadee Khanum, Aiena Kanum, Furzana Khanum, and Khyroonnissa Khanum; two legitimate sons, viz. Alif Khan by Shahzadee Khanum; and Imam Buksh, by another wife, Jabree Khanum, who had died in her husband's life-time; three concubines, viz. Sundal Beebee, Nugeena Beebee, and Soobhane Beebee; and by them three children, viz. two sons, Husan Ali and Koochul Ali, by Sundal Beebee; a daughter, Zuberdust Khatoon, by Nugna Beebee; besides Soobhane Beebee, pregnant of the plaintiff. Of the above the following had demised previous to the institution of the suit; and in the following order: 1st, Husan Ali; 2d, Imam Buksh; 3d, Sundal Beebee; 4th, Koochul Ali Khan, and lastly, Soobhane Beebee.

The Moosulman law officer of the Court being asked, "in the

1811. event of its being proved that the plaintiff is the daughter of Khoda Nowaz Khan, and that he had acknowledged himself the father, and provided for the performance of the 7 months ceremonies, to what share of the inheritance of Khoda Nowaz Khan is the plaintiff, under the above circumstances, entitled?" stated, in answer, that the estate of the deceased being divided into 480 parts, 56 were the share of the plaintiff.

Fyaz Ali Khan, v. Mussummaut Fatima Khatoon.

The Zillah Judge being of opinion, it was satisfactorily proved that the plaintiff was the daughter of Khoda Nowaz Khan, and acknowledged by him as such; passed a decree, adjudging to the plaintiff possession of an 18 gunda, 2 cowry, 2 crantee portion of the zemindary; being the proportional share to which she was entitled under the above *futwa* of the law officers of the Court. (a)

On appeal to the Provincial Court, that Court concurring in the opinion of the Zillah Judge, affirmed his decree, with costs against the appellant.

A further appeal was preferred to the Sudder Dewanny Adawlut; and it was judged proper to take the additional evidence of Mussummaut Khyroonnissa Beegum; which tending to confirm the former testimony respecting the birth of the plaintiff, and the acknowledgment of the zemindar that she was his daughter, the Court affirmed the decrees of the Zillah and Provincial Courts. Mussummaut Fatima Khatoon demised previous to the final decision of the suit; and her husband, Gohur Ali, claimed her estate in behalf of himself and infant son, Moozuffer Ali. The appellant having resisted the claim of Gohur Ali, on the ground that Fatima Khatoon had died childless, and that the claimant had fraudulently brought forward Moozuffer Ali, his son, by another woman, as the child of Fatima; the Court directed the execution of their decree to be suspended till the receipt of the evidence offered by the parties, relative to Moozuffer Ali's being, or not being, the son of Fatima Khatoon.

From the evidence adduced, it being clearly established, that Moozuffer Ali was the son of Fatima Khatoon, a final order was passed on the 13th of May 1812, by the Court (present J. Fombelle), declaring Gohur Ali and Moozuffer Ali to be the heirs to Fatima Khatoon's share of the zemindary in dispute; and directing the execution of the former decree in favour of Gohur Ali, on his own account, and as guardian to his minor son, Moozuffer Ali. (b)

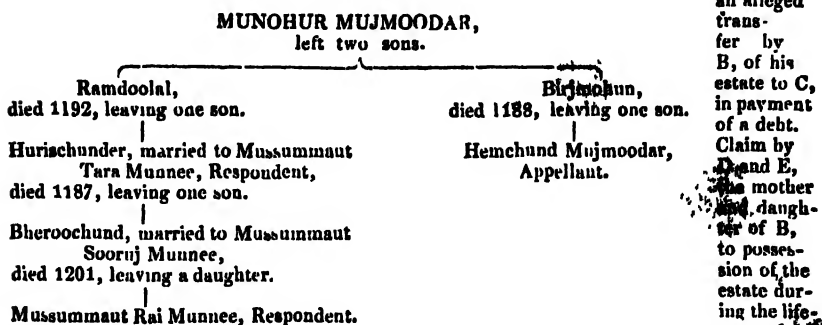
(a) 3 Crantee=1 rowry: 4 cowries=1 gunda: 20 gundas=1 ana, consequently the entire 8 ana estate=1920 crantee: and the proportion adjudged to the plaintiff=224. But $\frac{223}{1920} = \frac{56}{480}$.

(b) It is be presumed that the legal opinion in this case was induced by the fact (which was indeed deposed to by several of the witnesses) that the mother of the respondent was not only the concubine, but the slave of Fyaz Ali. The acknowledgment of parentage alone would not avail in the case of a free woman not married to the acknowledged.

HEMCHUND MUJMOODAR, Appellant, 1811.
versus
 MUSSUMMAUT TARA MUNNEE, and MUSSUMMAUT
 RAI MUNNEE, Respondents. Dec. 18th.

THIS was an action brought by Mussummaut Tara Munnee A, the wife of B, deceased, against Hemchund, the appellant, her deceased husband's nephew, on the 20th of August 1802, in the Zillah Court of Hooghly, executed a deed of talookdary lands, the annual produce of which was estimated at 263 rupees, 4 annas, 16 gundas, 3 crantee.

The following sketch of the family of the parties will tend to elucidate the case:



The plaintiff was the wife of Hurischunder, the only child of Ramdoolal, who, with his younger brother Birmohun, the father of the defendant; were joint heirs of Munohur Mujmoodar, their father, the original proprietor of the talook in question. Hurischunder, the plaintiff's husband, died in 1187, in his father's lifetime, leaving a son Bheroochund, who, in 1192, succeeded his grandfather Ramdoolal. In 1201 Bheroochund died, leaving Mussummaut Rai Munnee, an unmarried daughter; Mussummaut Sooruj Munnee, his widow; Mussummaut Tara Munnee, the plaintiff, his mother; Hemchund, the defendant, son of his grand uncle; and the widow of Ramdoolal, his grandfather.

The plaintiff claimed on behalf of herself and granddaughter Rai Munnee, as heirs to Ramdoolal, a 9 ana portion of the above lands, stating that there had been executed, between Ramdoolal and the defendant, a *hissehنامه* (a deed of partition,) by which the defendant agreed to receive a 7 ana share of the joint talook as his portion, and assigned to Ramdoolal a 9 ana share of the same; that under this deed, Bheroochund, and his family after his death, had for several years continued to receive a 9 ana portion of the net produce of the joint estate: but that the defendant had since, under a fraudulent agreement with Sooruj Munnee (the widow of Bheroochund) taken possession of the whole.

It was stated in answer, for the defendant, that Bheroochund having incurred a debt to the defendant, of 738 rupees, which he was unable to discharge, had, some time previous to his death, volving to

relinquish-
ment to C,
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fer by
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estate to C,
in payment
of a debt.
Claim by
Grand E,
the mother
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ter of B,
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sion of the
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ing the life-
time of A,
disallowed,
but, it not
appearing
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that B had
transferred
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to C, or
had died
indebted
to him, the
said deed
ruled not
to preclude
the rights
of the
other heirs
of B after
the death
of A;
a wife not
having the
power, under the
Hindoo
law, of
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(except for
special
causes) the
estate of a

1811. verbally made over to the defendant his share in the lands in question; and that his widow Sooruj Munnee had subsequently executed, in favour of the defendant, a deed of relinquishment (*ladavee*) confirming the act of her husband, and acknowledging the proprietary right of the defendant to the whole of the talook in question.

her on her
husband's
death.

The defendant denied the validity of the *hisseh-nameh*, alleging that it had been executed during his minority; and had never been acted upon; no division of the estate, or separation of the family, having taken place.

The *ladavee*, or deed of relinquishment, exhibited by the defendant, purporting to have been executed by Mussummaut Sooruj Munnee in his favour on the 17th Poos 1208, B. S., and registered on the 14th of February 1802, after stating that Bheroochund and the defendant had jointly succeeded to the talook and other lands, and reciting sundry sums of money, amounting in all to sicca rupees 738, advanced by the defendant to Bheroochund, to enable him to discharge debts incurred on a separate account; goes on to the following effect: "I have no son, I have a daughter and a mother-in-law. You support my husband's step-mother. The family worship, and other daily expences, the entertainment of travellers and guests, and the other expences of management, are all defrayed from the talook and land. You are my heir and heir to the talook, &c. Whilst the step-mother of my husband lives, you will support her. For the support of me, my mother-in-law, and my daughter, you have given me 21 beegas of ground, a garden, tank, dwelling-house, &c. and I have freely and voluntarily received them. I have no claim or demand on you on account of the talook and other lands; and you have no claim or demand against me for the sums of money above specified. My husband had verbally given to you his share in the talook, &c. I have heard this from my husband: I also, agreeably to the word of my husband, have given this writing. There is no claim on either side against the other. You and your heirs are proprietors of, and have the right of transferring by sale or gift the talook abovementioned. I, having received 21 beegas of ground, &c. as specified below, have given in writing this deed of relinquishment."

The Zillah Judge, in a decree reciting, that according to the opinion of the pundit of the Court, Sooruj Munnee, on the death of her husband, became the *Mokhtar* of his estate, and was entitled to transfer it in payment of her husband's debts; and that the above deed executed by her in favour of the defendant was fully authenticated by the testimony of the attesting witnesses, dismissed the suit, with costs against the plaintiff.

On appeal to the Provincial Court, that Court referred the proceedings to the Hindoo law officer, for the purpose of ascertaining whether the *ladavee*, executed by the widow of Bheroochund, was valid in conveying the estate of her husband to the defendant.

It was stated in answer, by the pundit, that if it were proved that Bheroochund, in his life-time, acknowledged the debt to be due to the defendant; and gave permission to his wife, Sooruj Munnee, to execute a deed conveying his estate to the defendant;

in such case, the *ladavee* would be a valid and legal instrument: 1811.
but not otherwise.

The Provincial Court, on the ground that there was no sufficient evidence of Bheroochund's having acknowledged the debt, or given authority to his wife to execute a deed conveying his estate to the defendant, and that from the length of time (about seven years), that had elapsed between the death of Bheroochund and the date of the *ladavee*, there was every reason to believe, that the debt, on which the transaction was founded, had never been incurred, or had been satisfied, reversed the *zillah* decree, and adjudged possession of the lands claimed to Mussummaut Tara Munnee, the plaintiff; at the same time making the costs of suit in both Courts payable by the defendant; and leaving him at liberty to bring an action for the recovery of any claims of debt he might have against the heirs of Bheroochund.

Hemchund being dissatisfied with the above decision, petitioned for the admission of a special appeal to the Sudder Dewanny Adawlut, on the grounds, that the Provincial Court had not called for evidence to establish the acknowledgment of Bheroochund, and his permission to Sooruj Munnee to execute the *ladavee*; and that on the death of Bheroochund, Sooruj Munnee was sole heir to his share of the land in question, and therefore entitled to transfer it in payment of her husband's debt.

The Court of Sudder Dewanny Adawlut admitted the appeal, on consideration of the insufficiency of the proceedings of the Provincial Court; and the erroneous adjudgment of possession to Tara Munnee, who was obviously not the legal heir of Bheroochund, his wife and daughter surviving.

Rai Munnee (the daughter of Bheroochund) was, on her petition, admitted as joint respondent with Tara Munnee.

In answer to a reference by the Court, the Hindoo law officers gave a *vyavastha* to the following effect: "If the proprietor of a landed estate die, leaving a grandmother, mother, stepmother, wife, unmarried daughter, and son of his father's uncle, his wife succeeds to the sole possession of the estate; but she cannot, without sufficient cause, or the consent of the abovementioned relations, transfer the property by gift or sale. The widow may transfer the real and personal estate of her deceased husband in discharge of his debts, if the amount of the debt exceed or equal the value of the estate; but if the value of the estate exceed the amount of the debt, the widow is only entitled to sell such part as may suffice to cover the debt. In order to render such sale by the widow valid, the debt must be proved by documentary evidence, or the testimony of witnesses; the declaration of the widow herself, whether she state that the debt was acknowledged by her husband, or merely herself acknowledge the justice of the debt, not being admissible. If in the present case the widow have transferred her deceased husband's estate in payment of his just debts; and the creditor under such sale obtain possession of the estate, the other heirs of the deceased are not entitled to set aside the sale by payment of the debt: but if, on judicial investigation, it be proved that the value of the estate exceeded the amount of the debt, the Court may pass such decision as they judge equi-

1811. table. Debts incurred by any member of a family living jointly, on account of any private concern, are exclusively demandable from that person, and his heirs, and not from the other members of the family; lastly, although the *ladavee* in question was not in itself sufficient to convey to the appellant the proprietary right in the lands, yet, if it were established by evidence, (as stated in the document in question) that the husband of Sooruj Munnee had verbally made over his share of the joint estate to Hemchund in payment of his debt, then Hemchund is entitled to the lands in question, and his right thereto would not be precluded, although it should appear that the value of the lands in question exceeded the amount of the debt, in payment of which they were so transferred."

Hemchund
Mujmoodar, v.
Mussaumant Tara
Munnee, and Mus-
sumant Rai Mun-
nee.

The Court directed such further evidence to be taken, as the parties might adduce respectively, to establish or disprove the existence of the debt alleged by the appellant; the transfer of the lands by Bheroochund to the appellant; and the appellant's obtaining possession under the verbal gift of Bheroochund.

On consideration of the evidence taken on these points, the Court (present J. H. Harington and J. Stuart), were of opinion, that there was no sufficient proof either of Bheroochund having incurred the debt on which the deed of relinquishment (*ladavee*) was grounded, or of his having, in his life time, made over the lands in question to the appellant. A final decree was therefore passed, amending the decree of the Provincial Court, as far as it went to give possession to Tara Munnee; and providing that, after the death of Sooruj Munnee, the deed of relinquishment executed by her, should not operate to preclude the right of the other surviving heirs of Bheroochund.

The respondents having relinquished their claim to a larger share than half of the common estate, it became unnecessary to take evidence respecting the alleged *hisseh-nameh*, or deed of partition between Ramdoolal and the appellant.

It was further adjudged that both parties should pay their own costs in the Sudder Court.

SHAMCHUND BABOO, and RAMCHUND BABOO,

1811.

Appellants,

versus

Dec. 26th,

RAJENDER MOKERJEA, Respondent.

THIS was an action brought by the respondent Rajender Mokerjea, on the 15th of January 1801, in the Zillah Court of Burdwan, to recover from the appellants the sum of 732 rupees, as rent for the year 1206, B. S. of about 454 beegas of land in mouza Raipore, of which the plaintiff was zemindar.

It was set forth in the plaint, that the defendants and their family had, for about 70 or 80 years, farmed the mouza Raipore, and, during the period of their farm, had illegally assumed as *lakhiraj*, or exempt from assessment, sundry portions of land, amounting together to the extent specified; that in the beginning of the current year, the plaintiff having purchased the above mouza, demanded the rent of the lands in question from the defendants, which they having refused to pay, he now sued for the recovery of the same. The defendants in answer alleged, that the lands were legally held by them on a tenure free of assessment, under the following grants of former zemindars.

1st, A grant by Rajah Kirutchund, to Nehalchund, grandfather of the defendants, of certain lands, as the site of a dwelling house, tank, garden, &c. to be held under a free tenure, denominated *mohutter*. The *sunnud* under which this land was claimed was not forthcoming; and the exact quantity of land had not been specified in it, but was stated by the defendants at 70 beegas; and the grant was alleged to have been made previously to the year 1148.

2nd, A grant by Rajah Tilokchund, to Manikchund, father of the defendants, under a *sunnud* bearing date the 30th *Bysakh* 1154, B. and purporting to convey to the grantee a certain portion of land within specified limits in mouza Raipore, for the purpose of establishing a market (*haut*), to be held as *mohutter*. The quantity of land was not specified in the *sunnud*, but was stated by the defendants at about 70 beegas.

3d, A grant from the same, to the same, under a *sunnud* bearing date the 22nd *Chey*t 1161, B. and purporting to convey to the grantee the *lakhiraj* tenure of 500 beegas of *mohutter* land, in pergunnah Pundwa, (in which Raipore is situate) and other pergunnahs, without further specification of the place where the lands granted lay.

4th, A grant from the same, to the same, under a *sunnud* bearing date the 22nd *Chey*t, 1162, B. and purporting to convey to the grantee a *lakhiraj* tenure, under the denomination of *mohutter*, of 61 beegas of land situate in mouza Raipore.

The defendants further stated, that of the lands granted to their grandfather and father, under the above *sunnuds*, amounting to 701 beegas, 501, viz. 70 beegas under each of the two first *sunnuds*, 300 of the 500 granted by the *sunnud* of 1161, and the 61 beegas specified in the *sunnud* of 1162, were situate in the mouza of

Suit by a zemindar to the rent of certain lands held by the defendant, on a *lakhiraj* or free tenure. Dismissed as irregular under the regulations: the extent of the land claimed exceeding 100 beegas. The plaintiff left to bring a new suit for any land less than 100 beegas alienated at one time, since the Company's accession to the dewanny.

1811. Raipore; and had been held by them, and their family, under these grants, since the date thereof, without interruption; and had been accordingly registered by them in the Collector's office in the Bengal year 1202 (1795); that having been granted previous to the 12th of August 1765, (the date of the Company's accession to the Dewanny,) they were not now resumable; that moreover, the land, the revenue of which was claimed by the plaintiff, being more than 100 beegas, the revenue assessable thereon, in the event of the *lakhiraj* tenure being resumed) belonged to Government, and under the regulations in force, was only recoverable by the Collector in a suit on behalf of Government.

Shamchund
Bahoo, and
Ramchund
Bahoo, v.
Rajender
Mokerjee.

The plaintiff, in reply, did not contest the validity of the above grants; but alleged that, under the grant for 500 beegas of the year 1161, the defendants had obtained possession of land in other mouzas, and that no part of Raipore had been alienated from the revenue assessment by that grant; that under the first and second grants, a much smaller extent of land had been granted than what the defendants now claimed to hold; and that it was for the excess of land thus held by the defendants he demanded rent.

The Zillah Judge deputed an *aumeen* to ascertain, by local enquiry and measurement, the quantity of land held by the defendants as *lakhiraj* in mouza Raipore, and other mouzas, under the above grants.

From his report, and the evidence taken by him on the spot, it appeared, that the *lakhiraj* land held, or transferred in gift or purchase by the defendants, under the above grants, in mouza Raipore, amounted to 496 beegas, $18\frac{1}{2}$ B. and in adjoining mouzas to 381 beegas, $17\frac{1}{2}$ B. that from the limits specified in the *sunnud* of 1154, for the *haut*, or market, a piece of ground, amounting only to 14 beegas, $10\frac{1}{2}$ B. appeared to have been thereby intended to be alienated; and under the first grant, 12 beegas, $18\frac{1}{2}$ B. only as the site of a dwelling house, with tank, garden, &c.

The Zillah Judge therefore, deducting 381 beegas, $17\frac{1}{2}$ B. *lakhiraj mohutter* land, held by the defendants in other mouzas, under the above *sunnuds*, their right to which was not disputed, considered the remaining 118 B. $2\frac{1}{2}$ B. to be all that they could be entitled to claim in the mouza Raipore, under the grant for 500 beegas of the year 1161; making, with the 12 beegas, $18\frac{1}{2}$ B. under the grant to Nahalchund, 14 B. $10\frac{1}{2}$ under the grant of 1154, and 61 beegas alienated by the grant of 1162, a total of 206 beegas $11\frac{1}{2}$ B. the whole that the defendants were legally entitled to hold under a *lakhiraj* tenure in the mouza of Raipore, and that consequently the revenue assessable on the excess, which (deducting the above 206 beegas $11\frac{1}{2}$ B. from 496 beegas $18\frac{1}{2}$ B. the actual extent of land held as *lakhiraj* by the defendants) amounted to 290 beegas, 7 B. was resumable by the plaintiff.

The plaintiff having, in separate suits brought against the purchasers of sundry portions of the land in question, obtained decrees for the recovery of the revenue due on 57 B. $9\frac{1}{2}$ B. of the above land, a decree was passed in the present suit, adjudging to the plaintiff the revenue assessable on the remainder, viz. 232 beegas, $17\frac{1}{2}$ B. of the land occupied by the defendants.

The costs of suit were made payable by the parties proportionably to the amount of the claim adjudged and disallowed. 1811.

On appeal by the defendants, Shamchund and Ramchund, to the Provincial Court of Calcutta, that Court affirmed the decree of the Zillah Judge, with costs against the appellant. Shamchund
Baboo, and
Ramchund
Baboo, v.
Rajender
Mokerjee.

A further appeal was preferred to the Sudder Dewanny Adawlut.

It appeared to this Court, that the respondent's suit was irregular, and ought not to have been entertained, under the regulations in force. The Court observed, that by sections 7, and 12, regulation 19, 1793, it is expressly provided, that the revenue of resumable tax-free lands, exceeding 100 beegas in extent, and alienated by a simple grant prior to the 1st of December 1790, shall belong to Government, and can be sued for only by the Collector under the authority of the Board of Revenue; that the lands the rent of which was sued for, amounted to 456 beegas; and were stated by the appellants to have been held by their ancestor, Manikchund, under the *sunnuds* above specified, up to the time of his death, which occurred in the Bengal year 1169; previous to the accession of the Company to the Dewanny of Bengal and Behar; and to have been since held by them uninterruptedly to the present time; that the plea of the respondent, that besides the lands of which possession was obtained under the *sunnuds*, other lands had been separated from the revenue assets during the term of appellants, was not established by the evidence in the case; and that a further investigation into the truth of that allegation, could not properly be held in a suit thus irregularly preferred; that if the respondent, from the records relating to the lands, or other evidence, was able to shew that the appellants had, since the accession of the Company, separated from the revenue assets any land lying within his, the respondent's, zemindary, and the quantity of which, alienated at any one time, did not exceed 100 beegas, he ought to have brought an action on account thereof against the appellants, or the persons who may have purchased from them, specifying the land so alienated, and the year in which the alienation took place, with other usual particulars. The Court further observed, that the appellants having, under the provisions of section 25, regulation 19, 1793, along with other *lukhiraj* land registered by them in the Collector's office, entered 300 beegas of land so held in Raipore, the respondent's talook, under the *sunnud* of 22nd *Chey* 1161, B. the grounds on which the Zillah and Provincial Courts founded their decrees, in favour of the respondent, were, independently of the irregularity of the action, wholly insufficient.

The Court (present J. H. Harington and J. Fombelle) accordingly reversed the decrees of the Zillah and Provincial Courts, and dismissed the suit; leaving it to the respondent to bring a new suit for any land, less than 100 beegas, alienated from the revenue assessment, at any one time since the accession of the Company to the Dewanny.

The Court being of opinion, that the Zillah Judge ought to have pointed out the irregularity of the suit to the respondent, and allowed him to amend his plea, directed the institution fees in all

the three Courts to be returned. The other costs were made payable by the respondent. (a)

(a) The two sections of regulation 19, 1793, on which the decision of the Sudder Dewanny Adawlut, in this case, was founded, are in the following terms:—

Sec. 7. "The revenue assessable under section 8, on land exceeding 100 beegas, of the measurement that may prevail in the pergunnah wherein it may be situated, and whether lying in one village, or two or more villages, and alienated by any one grant made previous to the 1st of December 1790, and which may be adjudged or become liable to the payment of revenue, is declared to belong to Government. The lands specified in this section, which may be adjudged liable to the payment of revenue, are to be considered as independent talooks."

Sec. 12. "It is to be the duty of the collectors, after receiving the sanction of the Board of Revenue for that purpose, as directed in section 14, to prosecute in the Court of Dewanny Adawlut on behalf of Government, for the recovery of the public dues from the lands specified in section 7, that are declared by this regulation subject to the payment of revenue; and no lapse of time shall be considered as a bar to the recovery of the public dues from such lands."

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- 13 One of the husband's heirs having for several years acted as a manager for his widow, who had taken possession of her husband's landed estate in satisfaction of dower, whilst none of the other heirs preferred any claim to the estate, may be considered as sufficient evidence of consent on the part of the heirs to the widow's right. 268

EXACTIONS.

- 1 Claim by a landholder in pergunnah Secunderpore on the *tehsildar* of the pergunnah, for the refund of undue exactions established and adjudged in part, viz. for ~~sums~~ illegally executed by the *tehsildar's* officers, with his knowledge and connivance. *Tehsildar* also subjected to a fine to Government of three times the amount so exacted. 229

EXECUTORS.

- 1 An executor may appoint a superintendent of an endowment on the demise of the appropriator. 17
- 2 The widow of an executor who pleaded the gift and possession of her husband's estate, in satisfaction of her dower, made answerable for paying out of the property so received by her, the money due to the heirs of the estate to which her husband administered. Judgment founded on an opinion of the law officers, that the husband had no right to give away what was not his own, and that the donation of property in his hands as executor could not therefore bar an action for the recovery of it. 152

- 3 An executor in selling houses, and other property belonging to the estate, ought to exact immediate payment instead of selling upon credit to irresponsible buyers; and in the event of the heirs of the testator suing to recover the assets, the executor or his representative will be responsible for producing them. 152

FAMILIES UNDIVIDED.

See JOINT STOCK.

FARM TENURES.

See LAND TENURES.

FEEES.

See PRACTICE, 11.

FINES.

- 1 A respondent fined 100 rupees by the Sudder Dewanny Adawlut, for mistating facts to the Court with respect to a decree of the Provincial Court, with a view to obtain an order for the enforcement of a decree of the Sudder Dewanny Adawlut, which the Provincial Court had delayed until further orders. 60
- 2 Respondents fined 200 rupees, and their *mokhtarkar* 50 rupees, for endeavouring to impose on the Sudder Dewanny Adawlut a false copy of a record. 85

FISHERY, RIGHT OF.

- 1 A river having changed its bed, the right of fishery in the old channel preserved to the proprietor in the new stream. 221
- 2 A, holding the right of fishery in a branch of the river, having taken possession of a *jheel* formed by overflows on the adjacent lands of B, declared on the suit of B to have no legal right or interest in the *jheel*; it not being connected with the channel of the river, which had not altered. 228

FRAUDS.

- 1 A will not published by a son for some years after the death of his father, nor exhibited in a suit instituted by his brother for a share of the paternal estate in the Zillah or Provincial Court, but first produced in appeal from the judgments of of those Courts to the Sudder Dewanny Adawlut, when it was found to contradict the appellant's original pleas, rejected by the latter Court, as the appellant could not be suffered to derive advantage from a will which, (if authentic), had been dishonestly suppressed by him. 111
- 2 Lands purchased at a public sale by A, with the money of B, under instructions to make the purchase in the name of B,

but fraudulently bought by A in his own name, and wrongfully withheld from B, adjudged to B on proof of the fraud. 132

- 3 A deed, called a *Wursutnameh* or deed of inheritance, (in which a widow in possession of a zemindary acknowledged two distant relations of her husband to be her heirs, and transferred the zemindary to them, on condition that they should support her for life), set aside as fraudulent and void on presumption that it was not the intention of the widow to transfer the estate before her death; and that the clause to this effect was surreptitious, or by some undue means imposed upon her, without her voluntary consent. 147
- 4 An *Ikrasnameh* or written acknowledgment, relative to a stated purchase of land, though supported by the testimony of witnesses, set aside as apparently fraudulent, under circumstances of strong presumption at variance with the purport of it. 157
- 5 A bond having been taken evidently by undue means through the official influence of the dewan to a collector, but nominally granted in favour of one of his dependants (a writer in the collector's office, who could not, from his means and situation in life, be supposed with any probability to have been the principal in the transaction), is cancelled as illegal and fraudulent. 165
- 6 Since the enactment of regulation 7, 1799, the courts can give no remedy against a fraudulent agent employed to purchase lands at a collector's sale in his own name, in an action for possession, but may cause him to refund the amount received, in an action for debt. 291
- ## GIFTS UNDER MOOHUM-MUDAN LAW.
- 1 A gift depends on tender and acceptance, and seizin is necessary to make it complete. 5
- 2 In a suit for lands to which the defendant pleaded a title under a gift from his wife lately deceased, made some years before her death, the question was, whether there had been possession under the gift sufficient to give it validity in the Moohummudan law. The law officers declared that delivery of seizin was sufficient, and continuance of possession not necessary. 12
- 3 A gift of land forming part of joint property, to be valid must be distinct, and the boundaries and extent of the property given be known. 12
- 4 A gift of a portion of any landed property without distinct allotment of it, and delivery of possession to the donee, is invalid in Moohummudan law. 24
- 5 A deed of gift by a father to his minor son for property, of which possession was not

- delivered at the time of the gift, or during the father's life; (about four years beyond the date of it), held valid in Moohummudan law, for the son being a minor, it is presumed, that the father was trustee for him. 31
- 6 A gift in lieu of dower is not invalidated by the marriage, on occasion of which the dower was settled, proving illegal by the return of the wife's former husband, supposed to have been dead. 31
- 7 A thing not existing cannot be a subject of gift. 54
- 8 A deed of gift declared invalid from possession not having been held under it during the life of the alleged donor. 113
- 9 A joint gift without discrimination of shares invalid according to the opinion of Aboo Hapeefa, but valid according to his disciples, Aboo Yousuf and Imam Moohummud. 114
- 10 The donation of a man's estate to his wife in satisfaction of her dower does not bar the recovery of property held by him as executor. 152

substituted name of a female relation (with the apparent intention of enabling her to take the estate at his death) is of no avail under the Moohummudan law against the right of the legal heirs of the real grantee. 250

2 A grant obtained in a fictitious or substituted name, is not illegal, and the property conveyed by such grant is vested in the real, not in the nominal grantee. 253, note

HIBEH BIL IWUZ.

See CONTRACTS, 23.

HIBEH BA SHURTOOL IWUZ.

See CONTRACTS, 3.

HIBEH MOSHAA, OR UNDEFINED GIFTS.

See GIFTS UNDER MOOHUMMUDAN LAW, 3, 4, 9.

IKRARNAMEH.

See ACKNOWLEDGMENTS. ENGAGEMENTS.

GIFTS UNDER HINDOO LAW.

- 1 The gift of the whole hereditary property declared valid, although held to be a sinful act. *sed quare?* 2
- 2 Claim under a deed of gift executed by the widow of a Hindoo zemindar, which, at his death, devolved on the widow; adjudged that by the Hindoo law the widow could not alien the estate, which at her death must pass to her husband's heirs. 62
- 3 A donation made by a widow of her husband's (and deceased adopted sons) estate to the son of her youngest daughter, (her eldest daughter, who had afterwards a son, being then living) declared invalid on a *ryvuustha* of the pundits, that a woman succeeding to the possession of property in right of her husband or of her adopted son, is not at liberty to alienate it without the consent of the legal heirs; or to settle it on one heir, while there is a possibility that a co-heir may be subsequently born. Estate therefore on the death of the widow adjudged to have devolved on her two daughters, both of whom had male issue at the time of their mother's decease. 164
- 4 On the suit of A against B, for possession of lands which A had assigned as a personal maintenance to his step-mother C, lately deceased, and which B had taken possession of on the plea of a gift from C, judgment given for A; it not having been competent to C to alienate lands so held by her, which reverted to A on her demise. 259

GOMASHTA.

See BANKING HOUSES, 2, 4.

GRANTS.

- 1 A grant obtained by the acquirer in the

INHERITANCE UNDER MOOHUMMUDAN LAW.

- 1 In a suit by one son of a deceased Moohummudan against another son for half of his estate, the Sudder Dewanny Adawlut consider that the plaintiff, son of the deceased by a slave girl, and the defendant, son of the deceased by his wife, were heirs in an equal degree. 48
- 2 But the deceased had settled on the defendant's mother a dower of 300,000 gold mohurs, which, at her death (before her husband) was demandable by her heirs. The husband, one of those heirs, gets 10 aas of her property (i. e. of the dower), and the defendant, her son, 6 aas. These 6 aas of the dower therefore were now demandable by the defendant from the paternal estate; and as the amount was greater than the whole estate, and claims of dower must be satisfied before partition of heritage; the Sudder Dewanny Adawlut adjudge, that the plaintiff's claim of inheritance will not avail. 49
- 3 Any male in whose line of relation to the deceased no female enters is residuary, and succeeds as such preferably to any distant kindred. 71
- 4 Sisters are excluded by the father. 71
- 5 Homicide, whether punishable by retaliation or expiable, is an impediment to succession to the estate of the person slain, but presumptive proof will not bar the claim. 75
- 6 The maternal grandmother will take the whole estate by inheritance, if there be no intermediate heir; as being entitled to her specific share and to the return for the surplus. 75

- 7 A maternal aunt being of the distant kindred cannot inherit while there is a specific sharer. 75
- 8 Suit by the daughter of an *aymadar* against the son for a share of an *ayma mouza*, to which the son pleads, that the mouza fell to the mother in payment of dower, and that she conveyed it to him. The plea not being substantiated, the Sudder Dewanny Adawlut adjudge to the plaintiff her share of the land, on a division of it according to the Moohummudan law of inheritance. 78
- 9 Male descendants in the 4th degree are preferred in a case of inheritance to a descendant of the 3d degree, in the female line from a common ancestor. 99
- 10 In a suit concerning hereditary property, all the legal heirs, though some of them were not claimants, included in the decree to render the judgment conclusive, in conformity with section 13, regulation 3, 1793 109
- 11 A will being produced twenty years after the father's death (of which no mention had been made during that interval), directly contradicting former pleas; and making a partial distribution of an estate, held not sufficient to preclude a judgment on the case according to the law of inheritance. 112
- 12 An alleged gift, from its not having been carried into effect during the life of the alleged donor, is no bar to a legal distribution, according to the law of inheritance. 113
- 13 Legacies by Moohummudan law limited to a third of the testator's property, the remaining two-thirds not being alienable from the heirs at law. 150
- 14 A person obtaining a grant in the name of another, with an intention to hold the property himself during his life, and to secure the succession of the nominal grantee on his death, cannot thereby defeat the right of inheritance of his lawful heirs, who are entitled on his demise to succeed to the property of which he died possessed as part of his estate. 250
- 15 According to the *Soonnee* code the brother of the deceased is entitled to inherit, as a collateral, after the lineal heirs. By the *Sheea* law the brother does not come in for any thing, if there be a daughter. 268
- 16 In a suit by an heir of the son of A against the widow of A, for a share of his estate as joint heir with the widow, to which the widow pleaded that the whole estate fell to her in payment of dower; there being proof that she had received in part of her dower the property possessed by the husband at his marriage, and afterwards remitted her claim to the residue; under such circumstances, the property acquired by A, after marriage, ~~was~~ held to have been his estate hereditarily by his heirs, and judgment given for the claimant's obtaining the share due to him as an heir of the son. 284
- 17 Appellant's claim to the moiety of an estate adjudged on proof, that it was the joint inheritance of the parties, though a mortgage debt contracted under the management of respondent's father was paid by respondent. 355
- 18 Claim by respondent, as daughter, to a share of her deceased father's zemindary. Adjudged, on proof, that she was the daughter of the deceased, and had been acknowledged by him as his child. 357

INHERITANCE UNDER HINDOO LAW.

- 1 Property given by a Hindoo to his daughter on the occasion of her marriage, is *stridhan*, and passes to her daughter at her death. At the daughter's death it passes to the next heir like other property, and the mother's brother is heir in preference to a daughter, who is a widow without issue. 2
- 2 The mother succeeds her son, leaving no widow nor issue male or female. 8
- 3 The daughter succeeds one, leaving neither male issue nor a widow, provided such daughter be mother of a son or likely to become so. 8
- 4 The uncle succeeds on failure of nearer heirs. 8
- 5 Property real and personal having been given by a Hindoo to his concubine, and descended at her death to two surviving daughters, on the demise of one daughter the sister takes her share; the lawful wife of the father has no claim. 9
- 6 An adopted son taking the estate of his adoptive father is excluded from inheritance in his own family. 20
- 7 A *Paunerbhara* or son not born in lawful wedlock, may inherit if such be the custom of the province, but not otherwise. 28
- 8 A zemindary had gone to the eldest sons of a Hindoo family successively, but after the great grandson, male issue failing, it went to his widow, on whose death the defendants (two consins german of her husband) took possession. At the suit of a descendant of the second son of the great grandfather; held that at the demise of the great grandson's widow the consins german, as his nearest relations, had the right to succeed. 29
- 9 According to the exposition of the Hindoo law as received in Bengal, the widow has a right to her husband's share for life, even although the family be undivided. 33
- 10 Suit for a zemindary in Orissa by the father's sister against the step-mother of the late zemindar, who left no issue (having died unmarried.) At his death there were living besides the plaintiff and defendant, a third wife of the grandfather, with her two daughters, half sisters of the father;

- one of these afterwards was married and produced a son, and the plaintiff also produced a son during the suit. The Sudder Dewanny Adawlut adjudge, under an opinion given by their pundits, that at the zemindar's death, the estate vested in the defendant as heir, and having once vested, could not be divested by the subsequent birth of male issue to other female relatives. *see quære?* 37
- 11 A Hindoo zemindar at his demise without issue left two widows, an adopted son of his brother and sons of his half brother. The first widow and then the son adopted by her (under due authority) died. The other widow (who states that she had also adopted a son after the death of the other under due authority) sues for the estate left by her husband; adjudged that to one moiety which was the estate of the son adopted by the other widow, she as step-mother, was not heir; but that she should recover one moiety in her own right. *see quære?* 39
- 12 Suit for the landed estate of a deceased Hindoo, situated in Bengal, by the son of his sister against the son of his paternal uncle; by the law of Bengal the plaintiff would be heir; by the law of Mythul the defendant. 43
- 13 The eldest of four brothers (proprietors of an undivided estate) dies, leaving a widow, two daughters unmarried and three brothers. His widow by the Hindoo law, as received in Bengal, takes his share of the estate. 41
- 14 Endowed lands are not hereditible. 180
- 15 Claim by the widow of a zemindar (continued on her demise by her husband's kindred) to recover possession of part of her husband's estate; dismissed on proof, that the defendant was entitled to it not under a deed of gift from the widow (as adjudged by the Zillah Provincial Court) since the widow could not alien the estate left by her husband, but on proof of the defendant being the legal heir of the husband, as adopted son. 263

INTEREST.

- 1 Penalty for illegal interest, declared in section 8, regulation 17, 1793, applicable to interest exceeding rates fixed by antecedent regulations from 28th of March 1780, and applied to interest of two bonds at 25 per cent *per annum*: the first dated in 1781, the second in 1784, although payment had been made under the former bond in discharge of the principal and interest, and the second bond was given for the balance. 94
- 2 Claim of appellant to balance of principal and interest alleged to be due on a mortgage; judgment against appellant, it appearing that the special condition of the mortgage only entitled the mortgagee to receive the usufruct as interest, though lower than the legal rate, leaving the time of redeeming the mortgage by payment of the principal lent to the option of the mortgagers. 120
- 3 The rule contained in section 6, regulation 16, 1793, for allowing interest only equal to the principal, when it may have accumulated so as to exceed the principal, regards cases where the interest is in arrears; not those where the interest is paid or realized from the usufruct of mortgaged lands, or where the usufruct is stipulated to be received in lieu of interest. 122
- 4 Claim by the respondent to interest during two appeals on the amount of a zillah decree passed in his favour and confirmed on each of the appeals. Claim adjudged. 154
- 5 On the institution of a suit to recover principal and interest on a bond, the interest should be calculated up to the time of the plaint; but the Sudder Dewanny Adawlut passed a judgment in favour of the lender for the recovery of the principal of the bond, with interest from the date of the bond to that on which the final decree should be carried into execution. The Court determined, that the restriction, contained in section 6, regulation 15, 1793, against a judgment for interest exceeding the principal, when the legal interest "shall have accumulated so as to exceed the principal" is not applicable to a case in which the accumulation is subsequent to the institution of the suit, and not ascribable, in any degree, to procrastination on the part of the creditor. 242
- 6 Lands being assigned for the liquidation of a debt, the Court (under all the circumstances of the case, especially from there not having been originally any stipulation for the payment of interest, and the presumption, that the person who made the assignment and subsequently agreed to the payment of principal and interest, intended a previous discharge of the principal from the annual collections) thought proper to adopt an equitable adjustment, on a calculation of the real produce of the assigned lands annually received by the assignees, by considering such receipt applicable in the first place to the discharge of the principal of the debt, and allowing the assignees or their representatives, interest at the rate of 12 per cent on each instalment of the principal as liquidated, to the time of its liquidation from the date on which the debt was contracted. 202
- 7 In a suit for the amount of two bonds with an equal sum as interest (under regulation 15, 1793, section 6, the interest due having exceeded the principal) one payment of interest is admitted, but it appears that the interest due since that pay-

ment exceeds the principal. The Sudder Dewanny Adawlut hold that the rule contained in the regulation quoted relates only to interest unpaid and in arrears, and that a sum equal to the principal is recoverable as interest exclusive of the payment made. 294

- 8 The decree of a City Court (for a balance of accounts) founded on the award of an arbitrator, was appealed on the allegation of corruption and partiality against the arbitrator. The Provincial Court not considering corruption proved, dismissed the appeal under section 38, regulation 5, 1795, without adjudging interest for the time the appeal was depending. The Sudder Dewanny Adawlut, on an appeal to obtain such interest, were of opinion, that it should have been adjudged under the general rule contained in section 3, regulation 13, 1796, and gave judgment for the payment of it accordingly. 312

ISTIMRAREE TENURES.

See LAND TENURES.

JOBRAJ.

See USAGE.

JOINT FUNDS.

- 1 In a zemindary acquired by one of four brothers living together, either with aid from joint funds or with personal aid from the brothers, two-fifths declared the share of the acquirer, and one-fifth the share of each of the others. 6
- 2 If property be acquired without aid from joint funds by the exclusive industry of one member of an undivided family, others of the family, though they were at the time living conjointly with him and still do so, have no right to share in the acquisition. 35
- 3 Claim of appellant to right of participation in certain property acquired by trade, while appellant and respondents were in family partnership with their late father; judgment against appellant, the property having been acquired by one of the respondents exclusively without any joint stock of the family. 91
- 4 One of four brothers who, while living in family partnership with the rest, obtained a considerable grant of land, held to be exclusively entitled to it by the Hindoo law; it not being shown that he obtained it by means of aid from any joint funds of the family. 178
- 5 Claim by a son on his father for a balance of cash; on proof that the money was acquired by the separate and exclusive industry of the son, and that the father therefore was not entitled to any part of it, judgment given for the amount. 182
- 6 Two brothers (Hindoos) living together

without any paternal estate, purchase sundry lands and hold them several years in common tenancy; claim by the younger against his elder brother for a moiety of the lands; it appearing that the defendant chiefly contributed the capital of the purchase money, both giving their labour to the improvement of it; 1-3d share of the estate adjudged to the plaintiff. 335

KABEEN-NAMEH.

See DOWER.

LAKHIRAJ TENURES.

See LAND TENURES, 4.

LAND TENURES.

- 1 On a claim being preferred by a respondent to recover from the zemindars (appellants) an excess of rent levied upon his talook, the claim was disallowed; it appearing that additions had been made to the assessment within the period of twelve years, prior to the decennial settlement, and there was no mention made of *mokurreree* tenure on his part in any authentic document. 100
- 2 But the respondent appearing to have a proprietary right in his talook, which, under the provisions of regulation 8, 1793, entitled him to have it separated from the zemindary of the appellants, he was advised to apply to the collector of the district for separation, in order that his *jumma* might be adjusted for future years according to the regulation. 100
- 3 *Birt* lands settled upon a zemindar's wife for her personal maintenance, adjudged not to be transferable by her. 124
- 4 *Lakhiraj* tenures exceeding 100 beegahs, and held exempt from assessment, though under incompetent grants before the 1st of December 1790, not assessable, but at the suit of the Collector on the part of Government, under sections 7 and 11, regulation 19, 1793. 130
- 5 Land claimed as a talook adjudged to be a *mouroozy ijareh* or hereditary farm, to be held at the usual rate of rent for similar tenures in the pergunnah. 139
- 6 Distinction between a tenure of the above description and a talook. 140
- 7 Lands held by a zemindar as a religious appropriation (*dewuttur*) of which he has the superintendence, not considered to form part of the zemindary, or transferable by the sale of the latter, provided the endowment be valid under the regulations. Nor does the zemindar's having made such endowment, invalidate it, if antecedent to the Company's grant. 174
- 8 A grant made to a person under the peculiar title of *Birt Ijareh* construed to convey a tenure inheritable by the heir of the grantee, and entitling him to hold the

- lands at the *istimrarce jumma* specified in the grant. 176
- 9 Claim on a talookdar to recover possession of certain lands as having been granted to the claimant's ancestor exempt from revenue under the designation of *shewuttur*. Lands adjudged on proof of grants made before the dewanny, with the exception of 15 bergaba, the grant for which was subsequent to the dewanny, and not sanctioned by Government. 188
- 10 Lands held at a low rent under a grant made by an agent of jagirdars, without their authority or knowledge, declared to be an invalid tenure. 238
- 11 In a suit brought by respondent, the zemindar of Khurukpore to recover zemindary *russom* from a dependant estate, to which appellant pleaded a settlement direct with Government; it appearing that the settlement with appellant was made exclusive of the *russom* claimed by respondent, judgment given for the respondent, and appeal dismissed with costs. 281
- 12 Claim to right of holding lands at a fixed rent in a zemindary purchased by the defendant; adjudged in favour of plaintiffs, on proof of an *istimrarce* tenure, and in conformity to section 49, regulation 8, 1793. 302
- 13 Zemindars are justified in withholding receipts for rent paid by talookdars, who demand them as if for a fixed rent, and who cannot prove their title to hold by an *istimrarce* tenure. 304
- 2 Claim of respondent to dower; recovery of one-third of it, payable on her marriage 40 years ago, barred from lapse of time; judgment given for remaining two-thirds payable on the death of her husband, which happened six years only before this action. 103
- 3 A person is put in possession of lands under a deed of adoption and gift, and being sued for the recovery of them, pleads adverse possession during more than twelve years. The deed in question not being construed to vest absolute property, and the grantee consequently not being in possession as proprietor, but as manager during the greatest part of the period stated; his plea was disallowed. 118
- 4 Members of a Hindoo family entitled as heirs to shares of the family estate; of which shares, during sixteen years, they never demanded separate possession, but allowed them to remain with other parts of the estate under the general controul and management of another of the sharers (a member of the family), and received a provision in land for their expences; not debarred from claiming possession of the shares, it not appearing that they ever consented to relinquish their right as sharers. 135
- 5 The rule of limitations cannot affect the right of redeeming mortgaged lands, as tenants in mortgage do not hold under a title capable of forming a right by prescription. 187
- 6 A plea of lapse of time will not avail against a claimant during the period of his minority, and the time can only be reckoned against him from the period of his coming of age. 192
- 7 On a claim by A and B against their relations C and D, for possession of a share of an undivided estate, it appearing that at the demise of their ancestor several years since, the claimants were heirs to 3½ anas; that they had all along held lands, appertaining to the estate for their expences; and that C and D, who managed the estate, had admitted the right of A and B to share within six years before the institution of the suit; a plea of lapse of time set up by C and D, to bar the claim, not admitted, and judgment passed in favour of the claimant for possession of the share, to which, as heirs, they were entitled. 225
- 8 In a claim for lands, of which possession had been fraudulently obtained, the limitation of time can only be counted against the claimants from the period at which the fraud was discovered. 239
- 9 A widow having had an estate made over to her by her husband in satisfaction of dower, and having held it until her decease, (32 years) without her title having been disputed by any of her husband's heirs; declared sufficient to give validity

LEASES.

- 1 In a suit to set aside a lease, the real lessee appearing not to be a party in the cause, the claim was rejected. 95
- 2 Claim by A on B, a landed proprietor, for the produce of lands of which a lease had been granted to the claimant for four years, and renewed in the same year for ten years further, but possession taken from him in favour of a new lessee; produce adjudged until the end of the first lease, the renewed lease invalid, as being in opposition to section 2, regulation 44, 1793. 212
- 3 A *potlak* or lease granted without the knowledge and authority of the proprietors by their agent, held to be illegal and invalid. 238

LIMITATION.

- 1 An estate having been sold to a person by the managing sharer of it, and the purchaser having, with the knowledge of the other co-purcners, retained undisturbed possession of it for upwards of ten years; this circumstance held by the pundit to be sufficient to give validity to the sale, and to bar any plea of its having been obtained by duress. 46

- to her title, and to vest the succession in her heirs. 243
- 10 Claim to the recovery of lands alleged to be the claimants right of inheritance, barred by lapse of time under the 15th section of regulation 3, 1793, as well as under regulation 2, 1805; the defendant or his ancestor, having held *bonâ fide* possession for more than twelve years antecedent to the suit. 253
- 11 On the claim of a person against the son of his brother for a share of an estate, it appearing, that the defendant and his father had held adverse *bonâ fide* possession for more than 12 years, the claim was disallowed. 297
- 12 Under the 5th and 6th sections of regulation 14, 1805, which restrict the courts from interfering with acts of the native government, or with suits in which the cause of action may have arisen more than 12 years before the acquisition of the district; a suit of the latter description is not cognizable. 314

MARRIAGE.

- 1 Supposing a Moohummudan to have married four slave girls, and then a free woman, the last marriage is good and is not a fifth marriage; for marriage with slave girls is of no effect in law. 49
- 2 What evidence required to prove marriage in Moohummudan law. 49

MASTER AND SERVANT.

The heirs of a native treasurer to the late Rajah of Benares, sued for embezzlement of a sum of money, which was proved to have been remitted to Calcutta by order of the Rajah, for a corrupt purpose; suit dismissed, as the remittance was authorized by the Rajah, whose successor might bring an action against the person by whom the money had been corruptly received, or his representatives. 183

MOKURREE TENURES.

See LAND TENURES.

MOHUNT.

- 1 Claim by the appellant on the respondent for a moiety of property possessed by a late *mohunt*. On proof that the respondent was installed as the *mohunt's* successor at the celebration of his obsequies, judgment given against the claim. 153
- 2 Claim to recover *lakhiraj* lands, which had been held by the late principal of a religious establishment, judgment for the claimant, on proof that he was duly appointed successor to the late principal. 170
- 3 On a claim by a *sanyasee* to the succession to a deceased *mohunt*, it appearing that the claimant was principal pupil of the

deceased, and was installed as his successor at his obsequies by an assembly of *mohunts*, judgment given in his favour. 218

- 4 The successor to a *gooroo*, or spiritual teacher, must by the law of the *sanyasee* sect be a *chela* or pupil of the deceased. 218
- 5 In a suit for possession of the endowed lands of a *mohunt*, the plaintiff, between whom and the defendant there had been disputes about the right of succession to the late *mohunt*, determined by a *punchayat* or assembly of *mohunts* convened by order of the Sudder Dewanny Adawlut, to be the rightful successor, and possession adjudged to him accordingly. 296
- 6 In a suit for a *mohunt*, on the ground that the plaintiff was the successor appointed by the last incumbent, and afterwards regularly installed; the case not made out, but the defendant in possession of the endowed lands not having been regularly elected or installed after the death of the last *mohunt* as required by the usage of the sect; the Sudder Dewanny Adawlut direct, that an assembly of *mohunts* be convened to elect and install the defendant (if entitled) or any other person in whom the title may be vested. 309

MORTGAGE.

- 1 In a mortgage granted in the year 1770, in Zillah Behar, it was stipulated, that the lands should remain with the mortgagee, and the profits be received by him until the redemption of the mortgage, (without any mention of interest) and that the mortgage should not be redeemed in the middle of any year. This was construed (as conformable to a mode of mortgage then prevalent) to mean that the usufruct of the lands was to be received by the mortgagee in lieu of interest, and that the time of redemption by payment of the principal at the end of any year was to be at the option of the mortgagee and his heirs. It was accordingly determined, that a mortgagee having, under the terms of the deed of mortgage, accepted the usufruct in lieu of interest for an indefinite period, has no right to demand, at his own convenience, payment of the debt from the mortgager, but must wait his voluntary payment of the principal, or the gradual extinction of the debt under section 10, regulation 16, 1793, in case the annual usufruct exceed the legal interest. 120
- 2 The rule contained in section 10, regulation 16, 1793, does not annul the stipulations of a mortgage in favour of the borrower, such as the mortgagees receipt of the usufruct in lieu of interest when it may exceed the legal rate of interest. 121
- 3 Claim to the recovery of an estate, mortgaged with conditional sale to become absolute at the end of a term now expired,

judgment for the mortgager, on proof, that offers of clearing the mortgage were made within the term, but evaded by the mortgagees. 169

- 4 The rule of limitation does not affect a claim to the redemption of a mortgage. 185

- 5 Nor a claim to redemption in the case of an assignment analogous to a mortgage. 202

- 6 Claim to principal and interest of a mortgaged bon, adjudged, together with interest during the trial of the suit. 242

- 7 The restriction contained in section 6, regulation 15, 1793, against a judgment for interest exceeding the amount of the principal, when the legal interest shall have accumulated so far as to exceed the principal, is not applicable where the accumulation is subsequent to the institution of the suit, and not ascribable in any degree to the procrastination of the creditor. 243

- 8 In a suit for possession of lands as the property of the plaintiff, to which the defendant pleaded a mortgage ("riha") from the plaintiff's ancestor, dated 60 years before, and urged lapse of time against the claim; that plea not being of avail in cases of mortgage, the Sudder Dewanny Adawlut adjudge that the plaintiff may recover on redeeming his mortgage. 292

MOUROOSY IJAREH.

See LAND TENURES, 5, 6.

OBSEQUIES.

The mere act of performing the funeral rites of a deceased Hindoo can give no title of succession without proof of right, but this duty is incumbent on the person succeeding to the estate of the deceased. 20

PARTITION.

See DIVISION.

PARTNERSHIP.

See JOINT FUNDS. RANKING HOUSES, 2, 3.

PAUNERBHAVA.

See INHERITANCE UNDER THE HINDOO LAW, 7.

PLEDGES.

- 1 Claim by the respondent to half the value of a diamond, of which his late father was joint proprietor with his uncle, and which the latter had pawned to the appellant. The pledge not admitted to affect the respondent's right, and judgment given in favour of his claim. 126

PRACTICE.

- 1 The decree of a Provincial Court in a suit for landed property passed during the appeal to the Sudder Dewanny Adawlut of another cause relating to the same property, and concealed from the knowledge of the Sudder Dewanny Adawlut, cannot be affected by the eventual decision of the latter Court. 61
- 2 A plea adduced in the Sudder Dewanny Adawlut, no mention having been made, in any former stage of the cause, of the circumstances which it recited, and no reason assigned why, if true, they had not been stated, was rejected as false on the face of it. 63
- 3 A decree having been passed for lands, is afterwards amended; the parties having represented the lands (not in possession of either of them) to be held by other persons in mortgage, whereas the alleged mortgagees when called upon, state themselves to hold as proprietors, paying a fixed *jumma*. The Sudder Dewanny Adawlut therefore adjudge a share of the *jumma* receivable, and not of the land; leaving the claimant, who objects to the asserted tenure of the possessors to sue for them if he think fit. 77
- 4 The Court of Sudder Dewanny Adawlut will not receive in evidence a document dishonestly suppressed by a party to a suit, and directly contradicting the plea on which his original defence rested. 112
- 5 In a suit concerning rent, the Court of Sudder Dewanny Adawlut do not consider it irregular to order a separation of the lands of the parties, on proof of independent proprietary right. 142
- 6 A new suit may be admitted to supply an evident defect in a former decree with respect to interest on the amount adjudged. 154
- 7 The Court of Sudder Dewanny Adawlut will receive fresh evidence in an appeal on clear and unquestionable proof, that it was not discovered until after the decree of the Provincial Court. 160
- 8 In special appeals the Court of Sudder Dewanny Adawlut do not consider themselves bound to decide more than the point on which the appeal is admitted. 279
- 9 Proof of corruption or partiality on the part of arbitrators is not required previous to the admission of an appeal from a decision founded on their award. 288
- 10 A decision of the *khalsa* is a final judicial sentence, and the Court of Sudder Dewanny Adawlut are consequently precluded from trying the merits of a case formerly decided by that authority. 307
- 11 A petition to enforce a decree presented after an interval of several years does not subject the petitioner to the institution fee as a new suit. 317

PRE-EMPTION.

- 1 The Hindoo law recognizes no right of pre-emption, though in practice the right seems to be universally admitted 1
- 2 The Moolhummudan law allows the right of pre-emption to a partner in the property of the land sold to one participating in the immunities and privileges of it, and to a neighbour. 1
- 3 On a claim of *shoeefa*, or right of pre-emption founded on vicinage and partnership, it appearing that plaintiff had made the requisite demand and protest on hearing of the sale, though payment was not immediately tendered, judgment given in his favour. 350

PRESUMPTION.

- 1 A member of a Hindoo family, among whom there have been no formal articles of separation, but who, as well as his father, has moved separately from the rest, and had no share of their profits or loss in trade, though he has occasionally been employed by them, and has received supplies for his private expenses, is presumed separate from family-partnership, and shall not be admitted to claim a share of acquisitions made by others of the family. 13
- 2 An estate having passed through three generations of the elder branch of a family, and remained in that branch during a period of more than a hundred years, is considered to be a separate estate in the hands of the widow of the last possessor, and not held for the behoof of the descendants of the younger branches of the family as co-heirs 29
- 3 It is presumed, that a father making a gift of property to his minor son, yet still retaining possession of that property, is acting as trustee for his son 31
- 4 The widow of a Moolhummudan declared his estate to have been given by him in his life time to a grandson. This is good ground for presumption that she must have remitted her claim to dower. 64
- 5 Presumption of homicide will not invalidate a claim to inheritance 75
- 6 A son having made a transfer of certain lands, the property of his father, and the father having made no objection for a period of nine years, his concurrence in the act of his son will be presumed 129
- In the case of a conditional sale of lands, if after the expiration of the period specified in the engagement for its taking effect, the person engaging to transfer, remains in possession of the estate upwards of a year without any claim being made on him; this circumstance is considered to be a strong ground for presuming either that something must have occurred to void the penalty of the engagement, or that it

had not been in the contemplation of the parties, that the estate should be actually transferred 143

- 8 The circumstance of agents selling on credit and charging a high rate of commission affords sufficient presumption, that they had rendered themselves responsible for the recovery of the money 150
- 9 A deed purporting to dissolve a partnership, being dated only six months before the failure of the banking house, it is presumable that the deed was collusively executed in contemplation of bankruptcy, with a view to withhold the property of the parties, from satisfying (as far as it would go) the debts of the house. 194

PRIVILEGES.

- 1 Claim to the exclusive privilege of performing within a certain limit the Hindoo ceremony of burning the dead, and receiving the usual compensation paid for such service, allowed by the *Sudder Dewanny Adawlut*. 279
- 2 The fees arising from the privilege confirmed in the above instance, however, were understood to be voluntary, and the precedent must be received with circumspection 280

PROOF.

See EVIDENCE.

REDIEMPTION.

- 1 In a case of *Bye bil nufsa* made by an agent according to the Moolhummudan law, inadequacy of price vitiates the sale, and this consideration is a sufficient ground for allowing the equity of redemption 57
- 2 The right of redemption cannot be barred by lapse of time under the rules of limitation, and a mortgage is redeemable at any time by liquidation of the principal lent 185

REGULATIONS.

- 1 Under the 2nd section of regulation 41, 1793, though a lease fixing the rent in perpetuity of a dependent *talookdary* tenure is so far invalid, it does not follow that the sale of the tenure should on the same account be void 172
- 2 The rules contained in regulation 11, 1793, for doing away the custom by which particular estates descended entire to a single heir, have prospective operation only as provided by that regulation from the 1st of July 1794, and uphold the validity of successions which may have actually taken place under the custom alluded to previously to that date. 237
- 3 The restriction contained in section 6, regulation 15, 1793, against a judgment for interest exceeding the amount of the principal, when the legal interest shall have accumulated so as to exceed the prin-

cipal, is not applicable where the accumulation is subsequent to the institution of a suit, and not ascribable in any degree to procrastination on the part of the creditor.

242

- 4 Section 28, regulation 5, 1793, construed not to require proof of corruption or partiality of arbitrators previous to the admission of an appeal from a decision founded on their award. 288

- 5 The 3rd section of regulation 13, 1806, construed to extend to appeals wherein the merits of the case have not been gone into, and to entitle to interest accruing during the appeal. 313

RELIGIOUS ESTABLISHMENTS, MOOHUMMUDAN.

See ENDOWMENTS, 3. TRUSTEES.

RELIGIOUS ESTABLISHMENTS, HINDOO.

See MOHUNT.

RELINQUISHMENT.

- 1 A *Ruffanameh* or deed of relinquishment executed by a widow, agreeing to receive about a third of the income rightly due to her, held by the pundits to be valid (if duly executed) and binding against her and her husband's heirs. But *quare*? 22

RENT.

See ARREARS.

RESUMPTION.

See DONOR AND DONEE.

SALES.

- 1 A *Bye-bil-wusfa* sale of land made by an agent on the part of the owner, declared void in Moohummudan law from the agent having exceeded his powers; from its being a sale at gross inadequacy of price, and from the presumption of collusion between the buyer and agent. 55
- 2 Claim of appellant to recover a talook sold by the Sheriff of Calcutta as part of his father's estate, on the ground of a previous gift of it made to him by his father; judgment for the appellant on proof of the previous gift. 115
- 3 The sale by a son of lands, the property of his father, held to be valid, on presumptive proof, that the act was authorized by the father. 128
- 4 The sale of certain lands at auction by the Sheriff of Calcutta, set aside on proof, that they had been previously mortgaged and conditionally sold. 167
- 5 And a plea being urged that the lands

were under an attachment when the mortgage was given, the plea held to be of no avail, it appearing that the Sheriff's sale took place in consequence of a different demand, and in execution of a different judgment from that under which the original attachment was made. 167

- 6 A purchase of a talook made during an attachment of the zemindary for public sale, declared of no avail against the purchaser at the public sale, but obligatory on the former zemindar and his heir, in the event of the public sale being set aside. 172
- 7 A purchaser of lands at public sale declared at liberty to relinquish his purchase, in consequence of their extent having been erroneously described at the time of sale. 176

- 8 A *pottah* for sale of a talook, at a fixed rent in perpetuity, invalid (under section 2, regulation 44, 1793), with respect to the fixed rent, but valid for the sale. 196

- 9 Claim by A on B, for lands bought at public sale by the late husband of B, on the alleged ground, that he bought them as agent on the part of A. This not being established, and it appearing on presumptive proof, that the purchase made by the husband of B was for himself; judgment passed, dismissing the claim. 231

- 10 A private sale of lands adjudged invalid (although the lands had been separated and assessed by the Collector) as the sanction of the Board of Revenue, which the regulations require, had not been obtained. 240

- 11 Claim by A on B and C, for possession of lands as having been purchased from B, who purchased them from C. B pleads, that they were not his to sell; that the sale to himself from C was conditional, and did not finally take effect; on proof to the contrary, and that the plea of B was collusive, with the view apparently of avoiding the sale of his lands in satisfaction of a public demand against him; judgment was given for the claimant. 262

- 12 A sale being made of lands in consequence of arrears of revenue, by a public officer duly authorized under the government of the Nuwab Vizier; such sale considered conclusive. 265

- 13 A sues B for lands, alleging that he purchased them at auction through B in B's name; that a conveyance was afterwards executed to him by B, but that B had since denied his title, and fraudulently retained the property. The alleged conveyance not being established, judgment passed, dismissing the suit; it being held that there was no other ground on which to maintain it, because, even supposing the plaintiff to be the real purchaser at auction in the name of the defendant, and de facto of possession by the defendant, such purchase being expressly prohibited by the

regulations, could not form a legal ground of action, or authorize the Courts to interfere in his behalf. 289

24 Sale of lands in discharge of arrears of revenue by the Collector of the Zillah, set aside ; it appearing that the estate sold had several years been acknowledged by the Collector and the Board of Revenue, and entered in the public records as distinct from the estate in which the arrears had accrued, and that separate engagements had been taken for the public revenue, though the two estates were never separated in the mode prescribed by the regulations. 331

FACTS,

Soonee and Sheea.

See INHERITANCE, 15. DOWER, 8.

SECURITY.

See DEBTS, 4. CONTRACTS, 7.

SETTLEMENT.

See DOWRY.

SHARES,

According to the Moohummudan Law of distribution.

- 1 The heirs to a landed estate being a son and two daughters, the property is divided into four parts, of which two fall to the son and one to each of the daughters. 16
- 2 Two-thirds of the deceased's property after payment of his debts fall necessarily to the heirs at law. 26
- 3 On the demise of a woman, leaving a husband and two sons, her estate will be divided into 8 parts, three of which will go to each of the sons, and two to the husband. 51
- 4 A person dying, leaving heirs, two sons, a mother, and a wife, his estate will be divided into 48 parts, of which 17 will go to each of the sons, 8 to the mother and 6 to the wife ; but in the event of his leaving no wife, the estate will be divided into 12 parts, of which 2 will go to the mother and 5 to each of the sons. 51
- 5 A widow takes an eighth, if there be children, and a mother a sixth if there be children, and a third if there be none, nor brother and sisters. 54
- 6 The estate of a deceased Moohummudan, leaving a wife, a son, a daughter and a brother, will devolve thus :—It will be divided into 24 parts, of which 3 parts or an eighth fall to his widow, and of the residue 14 will go to his son, and 7 to his daughter. His brother gets nothing. On the death of the son, his share of the estate being divided into 6 parts, a third goes to his mother (the widow), a moiety to his sister, and the residue to his paternal

uncle. On the death of his sister, she having been married, and having a son and a daughter, her share of the estate being divided into 36 parts, her husband gets a fourth (9 parts) her mother (the widow) a sixth (6 parts) and of the residue her son takes 14, and her daughter 7 parts ; on the death of the widow her husband's brother (being also her own cousin-german) gets her estate in preference to her daughter's daughter, or her daughter's son ; and on the death of her daughter's son, his share of the estate goes to his father, to the exclusion of his sister, who succeeds however on the death of her father ; on the death of widow's cousin-german his son succeeds to his estate. Thus, supposing these two last mentioned persons, namely the grand-daughter in the female line of the original proprietor, and the son of his brother (who was the cousin-german of the widow) to be the sole survivors, the whole estate will be resolved into 27 parts, of which the former will get 35 parts, falling to her in right of her mother, father, and her brother, and the latter 37 in succession to his father ; who obtained those shares as being paternal uncle of the son of the original proprietor, and cousin-german to his widow. 71

- 7 The grandmother is entitled to the specific share of a sixth, and to the residue of the estate by return to her (in the event of there being no admissible claimants as residuaries) in preference to all distant kindred, who are those in whose line of relation to the deceased a female enters. 75
- 8 The heirs of a wife at her demise being her husband, a daughter, a brother, and three sisters ; the husband takes a fourth of her estate, the daughter a half, the brother a tenth, the three sisters a twentieth each. 83
- 9 A person dies, leaving a widow, two sons and a daughter : his estate is divided into 960 parts, of which the widow succeeds to 120, or an eighth ; the two sons and the daughter to the remainder, in the proportion of a double share to the sons, viz. 336 parts to each son, and 168 to the daughter, who, afterwards dying, her share became divisible, between her mother, her son and her two daughters in the proportion of a sixth, or 28 of the 168 parts to the mother, 70 parts to the son, and 35 to each of the daughters. On the death of the mother (or widow), all her portion devolves on her son. 112
- 10 If a man die, leaving two sisters, one of whom has one son, and the other two, the sons on demise of their mothers will take *per stirpem* or inherit the shares of their respective mothers, but they will take *per capita*, if the deceased owner survived his sisters. 252
- 11 If a man die, leaving a widow, a son and his widow's mother, an eighth of his pro-

